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IN THE
Supreme Court of the United States

WAYNE STEPHENS
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BARRY LEVENSTAM
Counsel of Record
IRINA DMITRIEVA
AMY D. WILLS
JENNER & BLOCK LLP
330 NORTH WABASH AVE.
CHICAGO, ILLINOIS 60611
(312) 222-9350

Attorneys for Wayne Stephens

QUESTIONS PRESENTED

Petitioner Wayne Stephens, a black man, was convicted of wire fraud by a jury of eleven Whites and one Hispanic, with two alternative jurors also White, in the United States District Court for the Northern District of Illinois. On June 6, 2006, the district court granted Stephens a new trial, finding that the government exercised its peremptory strikes in violation of the principles set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986). The court's determination was based on its finding that the two race-neutral reasons described by the government as "particularly significant" in motivating its strikes (R. 83 at 2), were pretextual. In particular, the court found purposeful discrimination as to three stricken minority jurors; as to three more, the court concluded that it did not need to make findings. The government appealed the district court's order. On January 31, 2008, the United States Court of Appeals for the Seventh Circuit, by a 2 to 1 majority, reversed the district court's new trial order, finding that the government did not discriminate against any of the six minority jurors it peremptorily struck at trial. *U.S. v. Stephens*, 514 F.3d 703 (7th Cir. 2008). The Seventh Circuit's consideration of Stephens's *Batson* claims raises the following important questions:

1. Whether the Seventh Circuit's decision reversing the district court's factual finding of purposeful discrimination conflicts with this Court's recent ruling

in *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008) by: (a) requiring a finding that all race-neutral reasons proffered by the government were pretextual before a *Batson* violation can be found, and (b) failing to determine that alternative race-neutral reasons proffered by the government in addition to the reasons which the district court found pretextual, motivated its peremptory strikes "in substantial part;"

2. Whether the Seventh Circuit erred by expressly refusing to review the district court's factual finding of purposeful discrimination under the deferential clearly erroneous standard;

3. Whether the Seventh Circuit erred by failing to remand the case to the district court, so that the trial judge who presided over the jury selection proceeding could determine in the first instance whether the government discriminated against the three stricken minority jurors as to whom it had made no definitive finding.

Petitioner, Wayne Stephens, respectfully petitions this Court to review the decision of the United States Court of Appeals for the Seventh Circuit.

PARTIES TO THE PROCEEDING

The petitioner is Wayne Stephens, the defendant and defendant-appellee in the courts below. The respondent is the United States, the plaintiff and plaintiff-appellant in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wayne Stephens respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The June 9, 2006 Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, granting Stephens a new trial based on a finding of purposeful discrimination in the government's use of peremptory strikes, is unreported, *United States v. Wayne Stephens*, No. 02 CR 661, 2006 WL 1663447 (N.D. Ill. June 9, 2006), and is attached as Appendix B hereto. The opinion of the United States Court of Appeals for the Seventh Circuit ("the Seventh Circuit") in *United States v. Wayne Stephens*, 514 F.3d 703 (7th Cir. 2008) (attached as Appendix A hereto), consists of a majority opinion reversing a district court's new trial order authored by Judge Kanne and a dissenting opinion authored by Judge Rovner. The unpublished order of the Seventh Circuit denying rehearing on April 9, 2008, is attached as Appendix C hereto.

STATEMENT OF JURISDICTION

The Seventh Circuit issued its decision reversing the district court's grant of a new trial on January 31, 2008. Pet. App. A. Stephens's timely

Petition for a Rehearing En Banc was denied on April 9, 2008. Pet. App. C. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

No person shall be ... deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Wayne Stephens, who worked as a computer manager in Accenture's New York office, was charged in the U.S. District Court for the Northern District of Illinois with misusing the company's time-reporting and billing system (ARTES) to obtain approximately $60,000 in "personal loans" under the guise of advances for business expenses. *United States v. Stephens*, 421 F.3d 503, 505 (7th Cir. 2005) (*Stephens I*). On February 21, 2003, after a two-day jury trial, Stephens, who is Black, was found guilty of wire fraud under 18 U.S.C. § 1343 (the district court's jurisdiction over the case, therefore, arose under 28 U.S.C. § 1331). The jury who convicted Stephens consisted of eleven Whites and one Hispanic, with two alternative jurors also White. *Id.* at 513. Every single one of the peremptory strikes the government exercised removed minority jurors from Stephens's venire: two Blacks, three Hispanics, and one Asian. The government's peremptory strikes had a disproportionate impact on minority venire members by removing 66% of all Black venire members, 75% of all Hispanic venire members, and the only Asian juror. *Id.* at 513-14. In contrast, the government did not exercise a single peremptory strike against White jurors, even though they comprised 75% of Stephens's venire. *Id.* at 513. No *Batson* hearing took place at the time of jury selection because Stephens's trial counsel did not make a contemporaneous *Batson* objection.

On May 8, 2003, the district court *sua sponte* requested the government to explain the basis on

which it exercised its peremptory challenges at trial. *United States v. Stephens*, No. 02 CR 661, 2003 WL 21439862 at *1-2 (N.D. Ill. June 20, 2003). The government objected because the time for the district court to order a new trial expired. At the same time, the government set forth the "apparent" reasons for its strikes, claiming that its key criteria in jury selection was the education and work experience of the prospective jurors. *Stephens I*, 421 F.3d at 516-17.

On June 20, 2003, the district court vacated its order for lack of jurisdiction, but stated that it perceived "a *prima facie* evidence of discrimination" in the government's exercise of peremptory challenges and advised Stephens that he still had open "legal avenues ... to challenge the government's use of its peremptory challenges, including a post-conviction motion." *United States v. Stephens*, No. 02 CR 661, 2003 WL 21439862 at *5 (N.D. Ill. June 20, 2003). Shortly thereafter, the government advised Stephens that if he challenged the government's use of peremptory strikes on direct appeal from final judgment, rather than through a post-conviction motion, the government would waive the argument that Stephens forfeited his right to challenge the use of the government's peremptory strikes by failing to make a contemporaneous objection at trial. Consequently, Stephens pursued his *Batson* claim on direct appeal from final judgment. Because the government waived its forfeiture argument, the Seventh Circuit reviewed *de novo* the question of whether Stephens established a *prima facie* case of purposeful discrimination.

On August 29, 2005, in a 2-1 opinion, the Seventh Circuit found *prima facie* evidence of purposeful discrimination in the government's use of peremptory strikes at Stephens's trial. *Stephens I*, 421 F.3d at 514, 518. Specifically, Judge Rovner, writing for the majority, found that the government exercised its strikes in "a grossly disproportionate manner" against members of cognizable racial groups, and that, contrary to the government's contention, the record failed to reveal any "apparent" race-neutral reasons for the government's strikes. The Seventh Circuit held that the government's strikes against minority Jurors ##1, 9, 10, 21, 27, and 36 could not be readily explained by their lack of college education and blue-collar jobs because the government accepted five White jurors who likewise had no college degrees and no white-collar experience; furthermore, stricken Asian Juror #10 was both college-educated and had a white-collar position. *Id.* at 517. The Seventh Circuit also held that additional factors identified by the government, such as jurors' law enforcement connections and their relatives' criminal histories, were "inherently subjective" and "could as easily have resulted in accepting some minority jurors and striking Caucasian jurors." *Id.* at 517. The Seventh Circuit then remanded to the district court, so that the government could articulate its actual reasons for the strikes and the district court could determine whether these reasons were credible.

On remand, the district court allowed limited discovery on the *Batson* issue, including the prosecutors' jury selection notes, audio-recordings of

the *voir dire*, and juror qualification questionnaires. R. 81, 11/17/05 Court Order; R. 91, 12/13/05 Court Order; R. 131, 11/8/05 Tr. at 3. Both parties discussed this evidence extensively in their submissions to the district court. *See* R. 83, 105-07. In identifying its purported actual reasons for peremptorily striking the six minority jurors, the government listed essentially the same reasons it previously identified as "apparent" from the record, R. 83, as follows:

- Hispanic Juror #1 had a diploma of general education and also studied accounting at a vocational banking school. R. 101 at 02 CR 661 003. In addition to her work at a postal office, she had experience working as a loan representative at a bank. Her aunt was a police officer for 12 years. Tr. 29. During *voir dire*, Juror #1 stated that her brother was once under home arrest, but she did not live with him at the time and did not know the reason for the home arrest. Tr. 31. She also stated that, more than 10 years ago, she testified for the defense about the age of the alleged victim in a statutory rape case.[1] *Id.* The government claimed that it struck Juror #1 because: (a) she "did not have the education and work background that the government sought;" (b) her prior experience with the criminal justice system likely made her antagonistic to the government; and (c) she was a postal worker. R. 83 at 9-10.

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[1] There is no evidence suggesting that the defendant in that case was Juror #1's relative or a friend.

- Asian Juror # 10 held a graduate degree in social work and worked for the Chicago Department of Human Services, in the division that manages and funds the homeless service's delivery system. R. 101 at 02 CR 661 at 021; Tr. 48. The government claimed that it struck Juror #10 because: (a) she was a social worker and, thus, likely was liberal, and (b) the government did not like her facial reaction to another juror's statement, which the government could not remember. R. 83 at 11-12.

- Jurors ##9 and 21 were Hispanic men. Juror #9 had a diploma of general education and worked as a line operator at a packaging company. R. 101 at 02 CR 661 019; Tr. 47. Juror #21 had a high school diploma and worked as a semi-skilled technician at a car dealership. His brother-in-law served in the Army. R. 101 at 02 CR 661 043; Tr. 74-75. The government claimed that it struck Jurors ##9 and 21 because neither had a college degree, had only blue-collar experience, and because their misspellings on jury questionnaires and unresponsive answers during *voir dire* supposedly led the government to believe that they would not understand the government's case. R. 83 at 10-11, 13-14.

- Black Juror #27 completed one year towards an associate of science degree in business at the Chicago State University and had a diploma in diesel mechanics. R. 101 at 02 CR 661 055. She

worked as a bus service supervisor for 16 years. *Id.* The government claimed that it struck Juror #27 because she had a blue collar job, and likely was "strong-willed," allegedly making her prone to sympathize with Stephens and to "sway other jurors to her view or remain a lone holdout for acquittal." R. 83 at 14-15.

- Black Juror #36 completed 12 years of school and worked as a health care aide. R. 101 at 02 CR 661 073; Tr. 110. She previously worked as a typist for the Social Security Administration and for the Chicago Police Department. *Id.* Her brother at one time served time for burglary, but she stated that her brother's experience with the law would not carry over to the case to be tried and would not make it hard for her to be fair. Tr. 112-13. The government claimed that it struck Juror #36 because of her blue-collar work experience, absence of a college degree, and unresponsive answers during *voir dire*. R. 83 at 15-16.

On June 9, 2006, the district court issued its Memorandum Opinion & Order granting Stephens a new trial because the government discriminated against "at least some, and perhaps all" of the six minority jurors. R. 109 at 7. The district court found that the government's actions during voir dire were "inconsistent with its stated justifications" and that the government "applied its stated criteria unevenly as between members of racial and ethnic minority groups on the one hand, and Caucasians on the other." *Id.* The court specifically found that the

government discriminated against minority Jurors ##9, 21, and 36, but did not determine whether the government discriminated against minority Jurors ##1, 10, and 27, because doing so was unnecessary: "Stephens' conviction must be reversed 'if even one potential juror [was] excluded for impermissible reasons.'" *Id.* at 6 (*quoting Coulter v. Gilmore*, 155 F.3d 912, 919 (7th Cir. 1998)). The government appealed the district court's decision to the Seventh Circuit.

On January 31, 2008, in a 2-1 decision, the Seventh Circuit reversed the district court's finding of purposeful discrimination. *U.S. v. Stephens*, 514 F.3d 703 (7th Cir. 2008) (*Stephens II*). Writing for the majority, Judge Kanne refused to review the district court's finding of discrimination under the deferential clearly erroneous standard, citing the court's focus on the two primary justifications proffered by the government — the jurors' education and work experience — as an inappropriate "litmus test" and the court's alleged failure to examine "material portions of the record." The Seventh Circuit did not find that these two reasons were not pretextual, but rather that the government also gave other "non-discriminatory explanations" as fallback positions, which the district court allegedly failed to consider:

> The district court's central error was its failure to take into account the government's non-discriminatory explanations for its peremptory strikes. The district court presented the government's explanation as

> one in which the government was looking to exclusively excuse potential jurors who lacked white-collar experience and a college education, without a consideration of any other factors. Although white-collar experience and a college education were important to the government, the record demonstrates that the government never relied on these two factors alone.

514 F.3d at 713. Based on the appellate court's own (essentially *de novo*) examination of the record, the Seventh Circuit then concluded that the government did not discriminate against stricken minority Jurors ##1, 9, 10, 21, 27, and 36.

Dissenting Judge Rovner — who authored the majority opinion in *Stephens I* — criticized the majority for "end-run[ning]" the deferential review. 514 F.3d at 721. She stated that "there [was] no basis" for the Seventh Circuit's failure to review the district court's finding of discrimination under the deferential standard because the district court "appropriately focused on the factors identified by the government as those driving its peremptory challenges" and, contrary to the majority's conclusion, did consider "all of the factors" proffered by the government as explanations for its strikes. *Id.* at 721-22. Judge Rovner stated that, under the clearly erroneous standard, the district court's decision should have been "affirmed outright," or at the very least, remanded because the "convoluted facts of this case do not lend themselves to a decision

by an appellate court of the *Batson* issue as a matter of law." *Id.* at 725.

On April 9, 2008, the Seventh Circuit denied Stephens's petition for a rehearing en banc. Pet. App. C.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's Decision Conflicts With This Court's Ruling in *Snyder v. Louisiana*.

As an initial matter, the Seventh Circuit's decision in *Stephens II* conflicts with this Court's recent holding in *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008), to the extent it: (a) faulted the district court for focusing on the government's key criteria for peremptorily striking minority jurors, and (b) failed to determine whether the reasons other than the jurors' education and work experience motivated the government's strikes "in substantial part."

A. Under *Snyder*, the district court's finding that the government's key reasons were pretextual was sufficient for finding purposeful discrimination.

The government here provided several race-neutral reasons for striking each of the six minority jurors, but chief among them were the jurors' education and work experience, which the government described as "particularly significant in this case." (Government's Statement of Reasons, R. 83 at 2.) The district court found these two reasons pretextual in light of the government's actions during voir dire because the government: (1) left five White males on the jury who lacked both a college degree and any white-collar experience, (2) left one strike on the table instead of removing a White juror who did not satisfy its key criteria; and (3) struck an

Asian Juror #10 who was both college educated and had a white-collar position. R. 109 at 9-10. The district court concluded that the fact that two of the government's primary reasons were so transparently pretextual cast doubt on the remaining hodgepodge of fallback explanations. Therefore, the district court found purposeful discrimination.

The Seventh Circuit reversed the district court's finding, holding that the court erred by using the two key reasons offered by the government as a "litmus test" and by allegedly ignoring other, "non-discriminatory" reasons proffered by the government. *Stephens II*, 514 F.3d at 713. Hence, the Seventh Circuit effectively required the district court to have found that all reasons proffered by the government were pretextual before it could find purposeful discrimination. This newly-minted requirement, however, conflicts with this Court's recent holding in *Snyder*.

In *Snyder*, this Court found purposeful discrimination after determining that one of two race-neutral reasons proffered by a prosecutor was pretextual. 128 S.Ct. at 1212. Specifically, a prosecutor offered two race-neutral reasons for peremptorily striking a Black juror: a juror's alleged nervousness during voir dire and his student-teaching commitments. *Id.* at 1208. This Court found that the trial court never ruled on whether the first explanation was pretextual, and the second reason was not credible because the prosecutor accepted White jurors who disclosed similar conflicting obligations (the latter being the very same reason the district court here rejected the

government's primary reasons as pretextual). *Id.* at 1209.

Under *Snyder*, the district court's finding that the government's two primary reasons for striking minority jurors were pretextual was clearly sufficient to find *Batson* error. Because the Seventh Circuit's ruling reversing the trial court's finding of purposeful discrimination conflicts with *Snyder*, Stephens respectfully asks this Court to grant his writ petition and either reverse the Seventh Circuit's decision outright, or to vacate it and to remand to the Seventh Circuit for reconsideration in light of *Snyder*.

B. The Seventh Circuit failed to determine that other race-neutral reasons proffered by the government motivated its strikes "in substantial part."

In *Stephens II*, the Seventh Circuit held that the district court's "central error was its failure to take into account the government's non-discriminatory explanations for its peremptory challenges," i.e. the district court's alleged failure to credit the reasons other than the jurors' education and work experience. 514 F.3d at 713. The Seventh Circuit found no discrimination after concluding that these additional reasons were not pretextual. To the extent the Seventh Circuit sought to uphold the government's peremptory strikes on the basis of additional reasons alone, however, its analysis did not go far enough under *Snyder*.

The *Snyder* Court made it clear that a *Batson* challenge cannot be defeated merely by reciting an additional non-discriminatory reason for the strike, without first demonstrating that this reason indeed motivated the strike "in substantial part." *Snyder*, 128 S. Ct. at 1212. "[A] peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution." *Id.* But the Seventh Circuit has never determined that the government's strikes against the six minority jurors were "motivated in substantial part" by the reasons other than the reasons that the government itself identified as its key criteria — the jurors' education and work experience. Hence, to the extent the Seventh Circuit failed to perform an inquiry required under *Snyder* — to determine that the alternative, non-discriminatory justifications motivated the government's strikes "in substantial part," — Stephens respectfully asks this Court to grant his petition and to remand this case to the Seventh Circuit to re-examine it in light of *Snyder*.

II. The Seventh Circuit's refusal to review the district court's finding of purposeful discrimination under a deferential clearly erroneous standard conflicts with this Court's precedent and creates a split among federal circuits.

The Seventh Circuit's refusal to review the district court's finding of intentional discrimination under a deferential clearly erroneous standard is

unprecedented: the Seventh Circuit does not cite a single case involving a *Batson* inquiry in which an appellate court declined to review a district judge's decision regarding intent to discriminate for clear error.

This Court has held consistently that a trial court's finding regarding intent to discriminate is "a pure issue of fact, subject to review under a deferential standard." *Hernandez v. New York*, 500 U.S. 352, 364 (1991). It is reviewed on appeal for clear error: "On direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error." *Rice v. Collins*, 546 U.S. 333, 338 (2006). In *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985), this Court stressed that Fed. R. Civ. Pro. 52(a) "states straightforwardly that 'findings of fact shall not be set aside unless clearly erroneous.'" Because a finding of intentional discrimination involves credibility determinations, Rule 52(a) demands "even greater deference to the trial court's findings." *Id.* at 575. Most recently, this Court ruled in *Snyder* that "these determinations of credibility and demeanor lie peculiarly within a trial judge's province" and explained that:

> The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutors' credibility, and the best evidence of the discriminatory intent often will be the demeanor of the attorney who exercises the challenge. In addition, race-neutral reasons

> for peremptory challenges often invoke a juror's demeanor (e.g. nervousness, inattention), making a trial court's first-hand observations of even greater importance.

Snyder, 128 S. Ct. at 1208. Indeed, this Court has never held that a trial court's factual finding regarding intent to discriminate may be reviewed for anything but a clear error. All of the federal circuits that addressed this issue have held the same.[2]

Here, the district court's finding of intentional discrimination deserved substantial deference because it rested on the court's "own observation of the [jury selection] proceedings." R. 109 at 16. Thus, the district court was in the best position to evaluate the credibility of the government's explanations for its peremptory strikes. The Seventh Circuit,

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[2] *See United States v. Lara*, 181 F.3d 183, 194 (1st Cir. 1999) (ultimate findings of discriminatory intent should be reviewed under highly deferential standard because determination is intensely fact driven and often pivots on credibility); *Jordan v. Lefevre*, 293 F.3d 587, 593 (2d Cir. 2002) (same); *Forrest v. Beloit Corp.*, 424 F.3d 344, 349 (3d Cir. 2005) (same); *United States v. Blotcher*, 142 F.3d 728, 731 (4th Cir. 1998) (same); *Murphy v. Dretke*, 416 F.3d 427, 432 (5th Cir. 2005) (same); *United States v. Odeneal*, 517 F.3d 406, 413 (6th Cir. 2008) (same); *Bell-Bey v. Roper*, 499 F.3d 752, 757 (8th Cir. 2007) (same); *Tolbert v. Page*, 182 F.3d 677, 680 (9th Cir. 1999) (same); *United States v. Castorena-Jaime*, 285 F.3d 916, 927 (10th Cir. 2002) (same); *United States v. Edouard*, 485 F.3d 1324, 1341 (11th Cir. 2007) (same). The United States Court of Appeals for the District of Columbia Circuit has not issued an opinion on a *Batson* challenge.

however, refused to review the district court's finding of intentional discrimination under a deferential standard. It ruled that "no deference [was] due to the district court's decision finding intentional discrimination" because the district court supposedly misapplied the *Batson* test by failing to consider "the non-discriminatory explanations and supporting record presented by the government." *Stephens II*, 514 F.3d at 714.

There is simply no support for the Seventh Circuit's conclusion that the district court did not consider the supporting record. The parties' extensive submissions to the district court discussed prosecutors' notes, jury questionnaires, and the transcript of *voir dire*, and the district court expressly stated that it formed its opinion "[u]pon review of the evidence," "after assessing the evidence." R. 109 at 7. Further, there is no basis for the Seventh Circuit's conclusion that the district court "incorrectly recount[ed] much of the record" and "ignored all of the individualized explanations provided by the government." *Stephens II*, 514 F.3d at 713-14. Indeed, the Seventh Circuit does not identify a single instance where the district court "incorrectly recounted" the record. The Seventh Circuit faulted the district judge for focusing on two key explanations for the government's strikes, *i.e.* the jurors' white-collar experience and education, to the alleged exclusion of other "individualized explanations." But as the dissent correctly noted, the district court merely focused on the factors the government itself had identified as driving its strikes: "It is disingenuous to fault the district court

for focusing on those factors when it was the government that argued to the district court that 'virtually all of the government's strikes are readily explained by the jurors' work experience and ability to understand the case.'" *Stephens II*, 514 F.3d at 722 (Rovner, J. dissenting). Contrary to the Seventh Circuit's conclusion, the district court did not apply any "litmus test," but only examined the very reasons advanced by the government for its peremptories.

Moreover, the district court plainly considered other "individual factors" offered by the government to explain its peremptory strikes, but rejected them. In particular, the government argued that Jurors ##9 and 21's misspellings on the jury questionnaires, and Juror #36's unresponsive answers during *voir dire* demonstrated that they would have been unable to understand the government's case. R. 109 at 15-16 The district court, however, compared these stricken minority jurors with White Juror #11 who "also made mistakes on his written questionnaire and exhibited difficulty answering the Court's questions during oral *voir dire*," but whom the government nevertheless accepted. R. 109 at 15. Hence, contrary to the Seventh Circuit's conclusion, the district court did not "ignore" the government's explanations, but studied them and found them unpersuasive: "Even were the Court to have concluded, in our earlier discussion, that the government's originally stated criteria were the criteria it actually applied, we would nonetheless find the government's exercises of peremptory challenges against these jurors violated *Batson*." R.

109 at 17-18. These credibility determinations are for the district court, not the appellate court, and require "clearly erroneous" deference on appeal. By failing to review a district court's findings under the deferential clearly erroneous standard, the Seventh Circuit set itself apart from every other sister circuit and created a conflict with this Court's long-standing precedent.

Moreover, the district court's decision here was not clearly erroneous because, at a minimum, it was "plausible in light of the record viewed in its entirety." *Anderson*, 470 U.S. at 573-74. In addition to the statistical disparity between the government's strikes against minority vs. White members of Stephens's venire, the government's own system of grading prospective jurors demonstrates discrimination. In particular, the government's notes reflected that it graded four prospective jurors as "B minus" — Jurors ##20, 26, 27, and 36. *Stephens II*, 514 F.3d at 725-28. Jurors ##20 and 26 were White males; Jurors ##27 and 36 were Black females. The government struck both Black females and accepted both White males. *Id.* Significantly, the fact that the government graded all four jurors "B minus" undermined the Seventh Circuit's conclusion that Jurors ##20 and 26 must have had more "positive" characteristics for the government — if that were true, the government would have graded them differently.

Indeed, a closer comparison of the stricken Juror #27, a 39 year-old Black woman, and accepted Juror #20, a 50 year-old White man, both of whom the government graded "B minus," demonstrates

that the only meaningful difference between them was their race. In particular, both jurors: (1) had high school educations; (2) some college training in business; (3) blue-collar jobs; and (4) supervised other workers. R. 101 at 02 CR 661 041-42, 055-56. Further, neither had relatives in law enforcement or relatives with prior criminal history. *Id.* The government's claim that the two jurors were not identical in all respects because White Juror #20 attended college at the time of trial is meritless. R. 106 at 8. This Court held in *Miller-El v. Dretke*, 545 U.S. 231, 247 n. 6 (2005), that "potential jurors are not products of a set of cookie cutters," and thus, "[a] *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable." Moreover, the government did not have to choose between the White Juror #20 and the Black Juror #27, both of whom it graded "B minus," because it had enough peremptory strikes to remove both. Instead, it struck a Black female, because she supposedly would have sympathized with a Black defendant, and left one peremptory strike on the table. This demonstrates that the district court's finding of purposeful discrimination in the government's use of peremptory strikes was at a minimum "plausible in light of the record viewed in its entirety," and deserved substantial deference on appeal.

Therefore, Stephens urges this Court to grant his writ petition because the Seventh Circuit's refusal to review the district court's finding of discrimination under the deferential clearly erroneous standard conflicts with this Court's *Batson*

jurisprudence and creates a split among circuits. Additionally, it sets forth a dangerous precedent, whereby the standard of review on appeal from findings regarding an intent to discriminate may depend on the particular facts of each case and on whether or not an appellate court happens to disagree with the trial court's conclusion.

III. The Seventh Circuit's decision to conduct the third step of *Batson* analysis with respect to stricken minority Jurors ## 1, 10, and 27, in the absence of initial determinations by the trial court, conflicts with this Court's precedent and creates a split among the circuits.

In *Batson*, this Court held that trial courts have "the duty to determine if the defendant has established purposeful discrimination." 476 U.S. at 98 Since then, this Court consistently held that a trial judge who observed the jury selection process first-hand is in the best position to evaluate the credibility of explanations for peremptory strikes and to determine whether there was purposeful discrimination. *See Snyder*, 128 S. Ct. at 1208, *Miller-El v. Dretke*, 545 U.S. 231, 240-41 (2005), *Hernandez*, 500 U.S. at 364.

Here, the district court judge who presided over the jury selection proceeding did not determine whether the government purposefully discriminated against stricken minority Jurors ##1, 10, and 27. Instead, he concluded that such a determination was unnecessary in light of his finding that the

government purposefully discriminated against stricken minority Jurors ##9, 21, and 36. When the Seventh Circuit reversed the district court findings of purposeful discrimination against Jurors ##9, 21, and 36, it should have remanded the case to the district court to allow the trial judge to determine in the first instance whether the government purposefully discriminated against the other three minority jurors.

The remand would have been particularly appropriate here, where the government purported to explain its peremptory strikes against minority jurors by such subjective criteria as the jurors' demeanor and appearance. In particular, the government claimed that one of the reasons it struck Asian Juror #10 was her facial reaction to another juror's statement during *voir dire*. R. 83 at 12. The government never identified the statement that allegedly caused the facial reaction, or even the type of the alleged facial reaction which the government supposedly perceived as hostile. Likewise, with respect to Black Juror #27, the government explained its peremptory strike by the juror's appearance as a "strong-willed" woman. *Id.* at 14. The trial judge — who conducted the *voir dire* and hence personally observed the jurors and their demeanor — was in the best position to judge the credibility of the government's explanations.

Instead of remanding the case to the district court, however, the Seventh Circuit itself engaged in the credibility determinations as to whether the government discriminated against minority Jurors ##1, 10, and 27. The only reason the Seventh Circuit

gave for usurping the district court's role was that it had "the entire record before" it. *Stephens II*, 514 F.3d at 713. But this assumption, *a priori*, was incorrect. The "cold record" on which the Seventh Circuit relied was incomplete in that it did not include the district judge's independent recollection of the jury selection proceeding, including his recollection of the jurors' appearance and demeanor and the demeanor of the prosecutors exercising the strikes.

Moreover, this is not a case where the district judge can no longer remember the jury selection proceeding because of the passage of time — to the contrary, the district court's opinion demonstrates that the judge remembered the prospective jurors and their reaction to the court's questions. For instance, the district court determined that stricken Black Juror #36 displayed only "momentary confusion," rather than the type of confusion which would have prevented her from following the government's case, R. 109 at 17, and that stricken Hispanic Jurors ##9 and 21 did not appear any more confused than the accepted White Juror #11, who also gave unresponsive answers during voir dire. *Id.* at 15. These are precisely the type of first-hand observations that should inform the *Batson* credibility determinations.

Moreover, the Seventh Circuit's refusal to remand the case conflicts with decisions of the United States Court of Appeals for the Second Circuit which, in similar circumstances, routinely remands cases to trial courts to conduct the third step of the *Batson* inquiry. For instance, in *United*

States v. Alvarado, 923 F.2d 253 (2d Cir. 1991), the magistrate judge rejected the defendant's *Batson* challenge, finding that the government did not intentionally discriminate with respect to two out of four stricken jurors. On appeal, the Second Circuit remanded the case, so that the magistrate judge could determine whether the government discriminated against the remaining two jurors: "We think the appropriate course is to remand for findings by the Magistrate as to [the unaddressed jurors] and an ultimate determination on the issue of discriminatory intent based on all facts and circumstances." *Id.* at 256. Likewise, in *Galarza v. Keane*, 252 F.3d 630, 640 (2d Cir. 2001), the Second Circuit remanded the case after determining that the district court failed to thoroughly examine the record pertaining to the petitioner's *Batson* claim. In other cases, the Second Circuit has even ordered a new trial where a trial judge who presided over the *voir dire* was either unavailable or could no longer remember the pertinent facts. *See e.g., Barnes v. Anderson*, 202 F.3d 150, 157 (2d Cir. 1999) (acknowledging that remand to a trial court for the third step of *Batson* analysis would be the usual course, but ordering a new trial because of the death of the trial judge who presided over initial *voir dire*).

This Court has followed the same practice in employment discrimination cases. For instance, in *U.S. Postal Serv. v. Aikens*, 460 U.S. 711, 717 (1983), this Court vacated a finding of purposeful discrimination where it may have been influenced by a "mistaken view of the law" and remanded to a district court for redetermination.

Indeed, until *Stephens II*, only one federal circuit — the Ninth Circuit — deemed it appropriate to engage in the third step of the *Batson* inquiry without a remand to a trial court. In *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006) (en banc), the Ninth Circuit reversed a trial court's finding of no *Batson* violation after concluding that the trial court failed to examine the record, including the transcript of voir dire and the jurors' questionnaires, thoroughly. The four dissenting judges in *Kesser* sharply criticized the majority for undertaking "such a fact-intensive process" in the first instance. *Id.* at 377; *see also Brown v. Sue del Papa*, No. 06-15215, 2006 WL 3267778 at *3-4 (9th Cir. Nov. 13, 2006) (reversing a lower court's finding of no discrimination and holding that purposeful discrimination took place, based on the appellate court's own examination of the record).

The position taken by the Seventh and Ninth Circuits conflicts with the relevant decisions of this Court and creates a split with the Second Circuit. Moreover, it creates a dangerous precedent whereby appellate courts, which do not have the benefit of first-hand observation of the jury selection procedure, substitute their opinions for those of a trial court, without appropriate deference, whenever they determine that the cold record on appeal is sufficiently complete.

Because the Seventh Circuit decided an important federal question in a way that directly conflicts with the mandate of this Court and creates a split among the circuits, this Court should grant Stephens's petition.

CONCLUSION

For the foregoing reasons, Wayne Stephens respectfully requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit in this matter.

Respectfully submitted,

Barry Levenstam
Counsel of Record
Irina Dmitrieva
Amy D. Wills
Jenner & Block LLP
330 North Wabash Ave.
Chicago, Illinois 60611
(312) 222-9350

Attorneys for Petitioner,
Wayne Stephens

APPENDIX

Appendix A

In the
United States Court of Appeals
For the Seventh Circuit

No. 06-2892

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

WAYNE STEPHENS,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 02 CR 661—**Matthew F. Kennelly**, *Judge.*

ARGUED MAY 24, 2007—DECIDED JANUARY 31, 2008

Before POSNER, KANNE, and ROVNER, Circuit Judges.

KANNE, Circuit Judge.
This is the second time this court has considered the case of defendant Wayne Stephens. Stephens, a Yale-

educated corporate executive in New York, was convicted of three counts of wire fraud and was sentenced to 21 months' imprisonment. We previously affirmed the conviction against a sufficiency-of-the-evidence challenge. *United States v. Stephens*, 421 F.3d 503 (7th Cir. 2005) ("*Stephens I*"). In that opinion, this court also concluded that a *prima facie Batson* violation existed under step one of the three-part *Batson* test. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The case was remanded to the district court for further proceedings to be conducted pursuant to steps two and three of the *Batson* test. The district court determined on remand that the government had exercised its peremptory challenges to exclude prospective minority jurors in violation of the Constitution, and granted Stephens a new trial. The government appeals. We conclude there was no *Batson* violation and therefore reverse. The convictions are reinstated and affirmed, and the case is returned to the district court for resentencing pursuant to *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005).

HISTORY

Stephens, an African American, was an in-house manager overseeing computer and technology support at the New York City office of Accenture. Accenture is the largest consulting firm in the world, with 158,000 employees in 49 countries. *See* Wikipedia, Accenture, http://en.wikipedia.org/wiki/Accenture (last visited Dec. 10, 2007). Accenture, like

many large companies, required its employees to submit a time and expense report. Accenture used a computerized program, "ARTES," as its time and expense reporting program in 2000. The ARTES system had a feature that allowed an employee to manually add money to, or deduct money from, his paycheck. Apparently, the "add to/deduct from" feature was designed for expenses that were not addressed in other parts of the ARTES program.

Stephens used the "add to" feature to add amounts to his paycheck. From April through August 2000, he added approximately $68,000 to his paychecks. Accenture did not become aware that Stephens was increasing his paycheck until August 2000, when its internal auditors identified a $22,980 "add to" request made by Stephens. Accenture fired Stephens and reported his conduct to the government.

To convict Stephens of wire fraud, the government was required to prove beyond a reasonable doubt that: "(1) there was a scheme to defraud; (2) wires were used in furtherance [of] the scheme; and (3) Stephens participated in the scheme with the intent to defraud." *Stephens I*, 421 F.3d at 507 (citing *United States v. Owens*, 301 F.3d 521, 528 (7th Cir. 2002)). It was undisputed that Stephens took the money from Accenture through the "add to" function in ARTES. It was also undisputed that Accenture transferred the money to Stephens via wire transfers from Accenture's bank in Chicago, Illinois, to Stephens's personal bank account in New Jersey. Consequently, the trial centered around whether

there had been a scheme to defraud Accenture and whether Stephens had participated in that scheme.

The government presented evidence at trial that Stephens had engaged in a scheme because he disguised his "add to" requests so that Accenture would not identify them. This included Stephens's failure to submit copies of his ARTES reports to his supervisor and Accenture's accounting department, as required by Accenture procedure. Evidence was also presented that Stephens had submitted his reports for review in the period that he worked at Accenture before he began to use the "add to" feature to take money from Accenture.

On the intent issue, the government provided evidence of Accenture's personnel policies, Stephens's training on those policies, and his prior compliance with those policies before he began taking money via the "add to" function. The government also provided evidence that Stephens used the money to subsidize a lifestyle beyond his means for himself and his family. Thus, the government argued that Stephens knew that he should not take money from Accenture but did so anyway out of greed.

The government also presented evidence about how Stephens structured his "add to" requests. The first "add to" request was for $7,800 and Stephens also had a legitimate expense of $78 during that pay period. The government argued that this demonstrated his criminal intent because Stephens could claim a decimal error if challenged by

Accenture. However, Accenture did not challenge the $7,800 request. After the original $7,800 success, Stephens began to increase his requests until the final $22,980 request that Accenture uncovered in August 2000.

Stephens testified on his own behalf and stated that he believed that it was appropriate to obtain money via the "add to" function. He argued that he believed that this was an appropriate cash advance and he always intended to repay the money to Accenture at some point in the future. Stephens testified that he believed that cash advances were proper based on information another employee had told him.

The government cross-examined Stephens. It questioned him about alleged dishonest statements made by him on his resume concerning his educational background at Yale University. The government also sought to impeach him with prior acts, including his personal use of car rentals at his last company. The government also obtained concessions from Stephens that he did not obtain prior approval from anyone at Accenture for the alleged cash advances and did not sign a loan document or provide collateral to secure the advances. This allowed the government to argue that common sense dictated that Stephens knew that Accenture did not allow this type of advance to an employee.

The jury returned a guilty verdict on all three counts. Stephens's motion for a judgment of acquittal

challenged the sufficiency of the evidence on the issue of whether the government had demonstrated that Stephens had engaged in a fraudulent scheme. More than two months after trial, and before ruling on the judgment of acquittal motion or sentencing Stephens, the district court issued a *sua sponte* minute order raising the *Batson* issue. The district court stated that the government had used all of its peremptory challenges to strike minority jurors. The court further explained that it had been concerned about the government's exercise of its peremptory challenges during voir dire but assumed that the defendant would object. The district court explained that it concluded at the time that Stephens had a strategic reason for his failure to object.

Nevertheless, after reconsidering its original evaluation of Stephens's failure to object, the district court concluded that there was no valid reason for the defendant's failure. Consequently, the district court stated that it was correcting its prior decision not to question the government during voir dire. The court required the government to provide non-discriminatory explanations for its exercise of its peremptory challenges.

The government responded by arguing that the district court lacked the authority to raise the *Batson* issue *sua sponte* at that stage in the proceedings. The government also provided a variety of non-discriminatory explanations for its challenges. The district court then issued a second minute order agreeing with the government's position that the

court did not have authority to raise the *Batson* issue *sua sponte* at that stage in the proceedings and consequently vacated the original order. *United States v. Stephens*, No. 02 CR 661, 2003 WL 21439862 (N.D.Ill. June 20, 2003) (unpublished order). The district court was clear to note that the vacating of its original order did not change its view that a *prima facie* case of a Batson violation existed and, consequently, the district court advised Stephens that he should raise the issue in a post-conviction challenge pursuant to 28 U.S.C. § 2255. *Id.* at *5. The court also noted that because it had vacated its original order, it no longer had the ability to perform steps two and three of the *Batson* analysis.

Stephens then appealed to this court, resulting in our *Stephens I* decision. That decision rejected Stephens's challenge to the sufficiency of the evidence for his wire-fraud convictions. *Stephens I*, 421 F.3d at 507-09. As for the *Batson* issue, the government dropped its objection to Stephens's failure to raise a timely *Batson* claim. Consequently, the *Batson* claim was considered on the merits.

A divided panel held that Stephens had set forth a *prima facie* case of a *Batson* violation pursuant to step one of the three-part *Batson* test. The case was remanded to the district court to conduct additional proceedings pursuant to steps two and three. *Id.* at 518.

On remand, the government provided its non-discriminatory explanations for its peremptory challenges. It also provided its original contemporaneous notes from voir dire to support the proffered explanations. The district court recognized that the government had provided non-discriminatory explanations for its peremptory challenges. These explanations were, however, dismissed as pretextual, and the district court concluded that the government had used its peremptory challenges to eliminate minority jurors in violation of *Batson*. *United States v. Stephens*, No. 02 CR 661, 2006 WL 1663447 (N.D.Ill. June 9, 2006) (unpublished order).

ANALYSIS[1]

The Constitution prohibits the use of peremptory challenges to intentionally discriminate against jurors on the basis of protected characteristics such as race, national origin, and gender. *J.E.B. v. Alabama ex rel.* T.B., 511 U.S. 127, 146, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *Batson*, 476 U.S. at 99, 106 S.Ct. 1712. The parties, the jurors, and society as a whole have a right to be free from intentional discrimination in the use of peremptory challenges. "Although a defendant has no right to a 'petit jury composed in whole or in part of persons of [the defendant's] own race,' he or she does have the right to be tried by a jury whose members are selected by

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[1] A table setting forth characteristics of the jury venire in this case is provided in the attached Appendix.

nondiscriminatory criteria." *Powers v. Ohio*, 499 U.S. 400, 404, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 305, 25 L.Ed. 664 (1879)). Additionally, "discriminatory use of peremptory challenges harms the excluded jurors and the community at large" because it denies those citizens the opportunity to participate as jurors in the justice system. *Id.* at 406, 111 S.Ct. 1364.

Disparate impact is not sufficient to cause the constitutional violation; "discriminatory intent or purpose is required to show a violation." *Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) and *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)). "Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* (alterations and quotations omitted); *see also McCleskey v. Kemp*, 481 U.S. 279, 297-99, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979).

We determine whether discriminatory intent influenced the exercise of a peremptory challenge through the three-part *Batson* test. *Miller-El v.*

Cockrell, 537 U.S. 322, 328-29, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) ("*Miller-El I*") (citing *Batson*, 476 U.S. at 96-98, 106 S.Ct. 1712). The components are: first, the challenging party makes a *prima facie* showing that a peremptory challenge has been exercised on the basis of an impermissible characteristic such as race, national origin or gender; second, the opposing party offers its non-discriminatory reasons for striking the juror; and third, the trial court determines, based on the parties' submissions, whether the moving party has met his burden of proving purposeful discrimination. *Id.*

"'[T]he ultimate burden of persuasion ... rests with, and never shifts from, the opponent of the strike.'" *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (quoting *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam)). In this case, the burden of persuasion has always rested with the defendant, Stephens.

This court determined the existence of a *prima facie* case pursuant to step one in *Stephens I* and therefore we turn to steps two and three. The second step places an affirmative requirement on the striking party to bring forth a non-discriminatory explanation for its peremptory challenge; a mere denial or assertion that the party has acted in good faith is not sufficient. *Batson*, 476 U.S. at 98, 106 S.Ct. 1712. Although the exercise of peremptory challenges is often based on instinct, the exercising

party must "state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis." *Miller-El v. Dretke*, 545 U.S. 231, 252, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) ("*Miller-El II*"). Justifications based on racial or gender stereotypes-such as claiming a juror of a specific race is not suited to serve as a juror or, if selected as a juror, will be more likely to be partial to a party of the same race-do not satisfy the non-discriminatory requirement of step two. *Batson*, 476 U.S. at 97-98, 106 S.Ct. 1712.

"The second step ... does not demand an explanation that is persuasive, or even plausible," but instead the explanation only needs to be non-discriminatory. *Purkett*, 514 U.S. at 767-68, 115 S.Ct. 1769. A permissible explanation can appear foolish, unwise, or even unbelievable, because the only question at stage two is whether the party has provided a non-discriminatory explanation. *Coulter v. McCann*, 484 F.3d 459, 465 (7th Cir. 2007); *see also Miller-El II*, 545 U.S. at 267, 125 S.Ct. 2317 (Breyer, J., concurring); *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769. Only during *Batson's* third step does the persuasiveness of the justification become relevant. *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769; *Aki-Khuam v. Davis*, 339 F.3d 521, 527 (7th Cir. 2003). "'[T]o say that a trial judge may choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge must terminate the inquiry at step two when the race-neutral reason is silly or superstitious.'" *Aki-Khuam*, 339 F.3d at 527

(quoting *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769). Terminating at step two because of a silly, race-neutral reason "'violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Id.* (quoting *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769).

"The first two *Batson* steps govern the production of evidence....'It is not until the third step that the persuasiveness of the justification becomes relevant-the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.'" *Johnson v. California*, 545 U.S. 162, 171, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005) (quoting *Purkett*, 514 U.S. at 768, 115 S.Ct. 1769). "The relevant question during the third step of the *Batson* inquiry is whether a strike was racially motivated. It follows that *Batson* and its progeny direct trial judges to assess the *honesty*—not the accuracy—of a proffered race-neutral explanation." *Lamon v. Boatwright*, 467 F.3d 1097, 1101 (7th Cir. 2006); *see also Purkett*, 514 U.S. at 769, 115 S.Ct. 1769; *Hernandez*, 500 U.S. at 365, 111 S.Ct. 1859; *United States v. George*, 363 F.3d 666, 674 (7th Cir. 2004).

"The third step requires the court to weigh the evidence and determine whether the [proffered] nondiscriminatory reason for the strike is credible or if the [party opposing the strike] has shown purposeful discrimination." *Coulter*, 484 F.3d at 465. Consequently, the district court must evaluate the

credibility of the race-neutral explanation provided in step two. "Credibility can be measured by, among other factors, the [offering party's] demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El I*, 537 U.S. at 339, 123 S.Ct. 1029.

In addition, the district court may also consider whether the justification for the exercise of the peremptory challenge corresponds to a valid challenge for cause. "While the reason offered ... for a peremptory strike need not rise to the level of a challenge for cause, the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character." *Hernandez*, 500 U.S. at 362-63, 111 S.Ct. 1859 (citing *Batson*, 476 U.S. at 97, 106 S.Ct. 1712).

Credibility may also be evaluated by considering the offering party's consistency in applying its non-discriminatory justification. "'[I]f a [party's] proffered reason for striking [a prospective juror of one race or gender] applies just as well to an otherwise-similar [juror of a different race or gender] who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step.'" *Coulter*, 484 F.3d at 465 (quoting *Miller-El II*, 545 U.S. at 241, 125 S.Ct. 2317). When making a side-by-side comparison of included and excluded jurors, the district court should be mindful that "[p]icking jurors is a complex and multifaceted process. Individual factors or characteristics often do

not provide the 'silver bullet' that will mean acceptance or rejection of any potential juror. Rather, it is a combination of factors that will determine whether a party believes a juror will be favorable to their side." *Pruitt v. McAdory*, 337 F.3d 921, 930-31 (7th Cir. 2003). The district court should also be mindful that when making a side-by-side comparison, the compared jurors do not have to be "exactly identical" because "potential jurors are not products of a set of cookie cutters." *Miller-El II*, 545 U.S. at 247 n. 6, 125 S.Ct. 2317.

A further factor that may be considered in determining the credibility of the explanation is whether the nondiscriminatory justification offered in step two results in disparate impact on prospective jurors of one race or gender. "'[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another.'" *Hernandez*, 500 U.S. at 363, 111 S.Ct. 1859 (quoting *Washington*, 426 U.S. at 242, 96 S.Ct. 2040).

Traditionally, we review the district court's finding of intentional discrimination under a deferential standard of review. "'A finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court." *Batson*, 476 U.S. at 98 n. 21, 106 S.Ct. 1712 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)); *see also Rice*, 546

U.S. at 338, 126 S.Ct. 969 ("On direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error.") (citing *Hernandez*, 500 U.S. at 364-66, 111 S.Ct. 1859); *United States v. Evans*, 192 F.3d 698, 700 (7th Cir. 1999) ("The trial court's determination about the ultimate question of discriminatory intent is a finding of fact, which will be overturned only if clearly erroneous."); *United States v. Roberts*, 163 F.3d 998, 999 (7th Cir. 1998). Under this deferential standard, we will not reverse the district court's decision "simply because we 'would have decided the case differently.'" *Easley v. Cromartie*, 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (quoting *Anderson*, 470 U.S. at 564, 105 S.Ct. 1504), and instead will reverse only "'if, after reviewing the evidence, we are left with a definite and firm conviction that a mistake has been committed.'" *United States v. Mendoza*, 457 F.3d 726, 729 (7th Cir. 2006) (quoting *United States v. Arocho*, 305 F.3d 627, 641 (7th Cir. 2002)). Determining that "two permissible views of the evidence exist" is not sufficient for a reversal. *United States v. Marty*, 450 F.3d 687, 690 (7th Cir. 2006).

But deference is due only when a district court properly performs its task in the first instance. "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)); *cf. United States v. Robinson*, 435 F.3d 699, 701 (7th

Cir. 2006) ("When a judge does not properly calculate a guidelines sentence, our review for reasonableness is forestalled."); *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006). Additionally, we cannot defer to a district court decision that ignores material portions of the record without explanation. "[W]henever a district judge is required to make a discretionary ruling that is subject to appellate review, we have to satisfy ourselves, before we can conclude that the judge did not abuse his discretion, that he exercised his discretion, that is, that he considered the factors relevant to that exercise." *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005). Our deference depends on "the district court's account of the facts [being] plausible in light of the record viewed in its entirety." *Bowles v. Quantum Chem. Co.*, 266 F.3d 622, 630 (7th Cir. 2001) (citations omitted). When deferring to the district court, "reasonable doubts should be resolved in favor of the district judge's ruling." *Cook v. City of Chicago*, 192 F.3d 693, 697 (7th Cir. 1999). But our exercise of deference requires the district court's "greater immersion in the case." *Id.*

Here, we are unable to defer to the district court's decision finding intentional discrimination by the government. The decision of the district court incorrectly recounts much of the record and fails to note material portions. Because the district court did not factor in material portions of the record, it misapplied the *Batson* three-part test. As a result of its misapplication of the *Batson* test, no deference is due to the district court's decision finding intentional

discrimination. We note that even under a clearly erroneous standard of review, the district court's result would not pass muster. The district court did not perform its task in accordance with *Batson*; it failed to consider the entire record and misapplied the three-part test. In making an error of law, the district court abused its discretion. *Koon*, 518 U.S. at 100, 116 S.Ct. 2035.

Facing this situation, we are presented with two options. One option would be to vacate the original decision and remand to the district court with instructions to perform its task in the manner it should have carried out originally. We see no value in ordering another remand for additional proceedings. Viewing the record now in its entirety presents only one plausible conclusion—that there is no *Batson* violation in this case. A second proceeding in the district court would be a redundant exercise. As such, our course is to reverse the district court. *See Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 524 (7th Cir. 1994) ("We have the entire trial record before us and, having reviewed it thoroughly, we confidently conclude that Phillips did not carry its burden, and thus there is no need to remand this case ..."). As in *Loyd v. Phillips Brothers, Inc.*, we have the entire record before us, and have reviewed it thoroughly. We confidently conclude that Stephens did not carry his burden of persuasion, as required by *Batson's* third step. Thus, remand would be futile as there is only one plausible conclusion based on the entire record that there was no Batson violation. *See also Pervaiz v. Gonzales*, 405 F.3d 488, 491 (7th Cir.

2005) (stating that remand would be futile if it was clear that petitioner's claim would necessarily fail).

The district court's central error was its failure to take into account the government's non-discriminatory explanations for its peremptory challenges. The district court presented the government's explanation as one in which the government was looking to exclusively excuse potential jurors who lacked white-collar experience and a college education, without a consideration of any other factors.

Although white-collar experience and a college education were important for the government, the record demonstrates that the government never relied on these two factors alone. By the district court's overemphasis of these two characteristics-to the exclusion of other significant points-the court turned white-collar experience and a college education into a simple "litmus test" and ascribed that test to the government, despite the fact that those two factors were not used in that fashion by the government. By transforming a lack of white-collar experience and college education into a "litmus test," the district court was left with a construct in which it would simply find that the "litmus test" was pretextual, and in light of the finding of pretext could easily explain that this new-found pretext was evidence of intentional discrimination.

The district court construed the following argument to support its finding of intentional discrimination.

First, the district court noted that the government exercised only five of its seven peremptory challenges—all five excluding minority jurors—but did not challenge white jurors who lacked white-collar experience or a college education. Thus, the district court concluded, if the government was serious about excluding non-white-collar or non-college-educated jurors, it would have, at a minimum, used its other two peremptory challenges to exclude two white jurors who lacked these characteristics.

Second, the district court found the government's explanation pretextual because the government used its peremptory challenge to exclude a minority juror, Juror 10, an Asian American woman who had a college education and white-collar experience. The district court concluded that Juror 10 met the government's "litmus test" (ascribed to it by the court), and therefore should have been acceptable. In light of these two inconsistencies—failing to strike any white jurors who lacked white-collar experience or a college education, and striking a minority juror who had white-collar experience and a college education—the district court concluded that the government's explanation was pretextual. Seeing pretext, the district court reverted to its original view of this case, that the government had used all of its peremptory challenges to strike minority jurors and had not used a strike against a white juror.

By placing sole emphasis on the white-collar and college-education factors, the district court did not

credit the government's strategy in selecting jurors. The government's focus was finding jurors who could understand its case. To prove its case, the government would have to explain accounting and business practices of Accenture-a large international corporation-as well as the operation of the ARTES system, and draw upon traditional workplace practices to make its argument that Stephens had the requisite criminal intent. The government looked to white-collar experience and a college education as two indicators to suggest that the juror could understand the case, but it did not elevate these two factors to the exclusion of all others.

We explicitly recognized in *Stephens I* that the government explained that it was relying on a number of factors in addition to white-collar experience and education including "law enforcement or military experience, criminal history, association with others with law enforcement or military experience or with criminal histories, past litigation experience, and even the presence of spelling or grammar mistakes on the forms the prospective jurors completed." 421 F.3d at 517. In that decision, the majority specifically refused to consider these "actual" reasons offered by the government during *Stephens I* because the court was reviewing only the limited issue of whether a prima facie case existed under step one of the *Batson* test.

Thus, this case was remanded to the district court to give it an opportunity to consider these individualized explanations offered by the

government under steps two and three of the *Batson* analysis. Nevertheless, the district court neglected to do this when it ignored all of the individualized explanations provided by the government and instead returned to the sole "litmus test" of white-collar experience and college education. The district court did not perform step three because it did not consider the non-discriminatory explanations and supporting record presented by the government. Instead, the district court reiterated step one of the *Batson* analysis—that the government used its strikes to eliminate minority jurors without an apparent explanation.

But, the government did provide the district court with detailed individualized explanations regarding its strikes of minority jurors. For example, Juror 10, an Asian American woman, had both undergraduate and graduate degrees. She worked for the Chicago Department of Human Services and her division was responsible for providing funds to organizations helping the homeless. The government explained that it exercised a peremptory challenge to strike Juror 10 because "her background and actions during jury selection made her seem potentially hostile to the prosecution [and this] negative attitude outweighed" her education and work experience. The government explained that, "[i]t was the impression of the prosecutors that homeless advocates in general have negative attitudes towards the police because they do not see the police as interested in helping the homeless and because many of the homeless individuals they serve fear and dislike the police."

The government also felt that Juror 10 was likely "politically quite liberal" due to her willingness to help the homeless. "In the view of the prosecutors, individuals with such views often are highly skeptical of the government's exercise of police power, such as through criminal prosecutions, and are more inclined to challenge or question representations made by the government than other individuals." One of the prosecutors claimed to see what he perceived to be negative body language from Juror 10 when another prospective juror was answering a question. This led the prosecutor to conclude that Juror 10 was unfavorable to the government.

Juror 10 fit the court-ascribed "litmus test" by having both a college education and white-collar experience, yet she was clearly unacceptable to the government. But the district court did not consider this individualized explanation. Its overemphasis on white-collar experience and college education led it to conclude that the striking of minority Juror 10 was pretextual-even though it was apparent that the government had a valid, unrebutted non-discriminatory explanation for its peremptory challenge.

The district court did not consider the record and specifically the contemporaneous notes on jury selection provided by the government. If the district court had considered the record it would have seen evidence demonstrating both that the government used individual factors and also that it did not

intentionally discriminate. The individual factors utilized by the government to assess the prospective jurors included appropriate positive and negative non-discriminatory factors. For example, with Juror 10, the government's notes included such observations as "lefty," "social," "social work" and "funds homeless delivery system," demonstrating that the government was authentic in its explanation that Juror 10 was unacceptable due to her perceived views. The government's notes substantiate that the government examined a variety of individual, permissible factors related to each juror, a fact that the majority previously recognized in our Stephens I decision. Work history and education were two primary factors but not the exclusive factors. By venturing into the record, we can see that the government exercised its peremptory challenges in a nondiscriminatory manner.

The record demonstrates that the district court erred in another of its conclusions. The government pointed out to the court that Juror 4, a Hispanic juror, had been seated and that the government did not use a strike on Juror 13, an African American juror, as evidence that it was not discriminating. In fact, Juror 13 was not seated because she was struck by the defendant. The district court, however, dismissed this argument as "not particularly strong evidence," *Stephens*, 2006 WL 1663447 at *7, and instead returned to its white-collar and college-education "litmus test."

The government's contemporaneous notes confirm most of its assertions. The government gave each juror a grade ranging on an A to F scale, apparently to rank how favorable it believed the perspective jurors were to the government's case. Juror 13, the African American juror who was struck by a defense peremptory challenge, received a grade of "A-" in the government's notes. This is the highest grade given to any juror by the government—the government did not give any A+ or A grades when evaluating jurors—and so Juror 13 was tied at the proverbial top of the government's class with Jurors, 2, 8, 14, 18, and 24. This placed Juror 13 in the top six jurors out of the total 40 jurors in the venire. The defendant used peremptory challenges to strike four of the government's top jurors—Jurors 8, 13, 14 and 18-while Jurors 2 and 24 were seated.

Juror 13 was not only acceptable, she was a first pick for the government. Looking at her background, it is easy to see why. She had an MBA from the University of Chicago and had worked as a product manager and consultant for two cosmetics companies. She also had lived in several places before coming to Chicago, including St. Paul, Minnesota; St. Louis, Missouri; Paris, France; New York, New York; and Bangkok, Thailand. The government made a notation of "urbane" next to the listing of the cities. And unlike Juror 10, who had a college education and white-collar experience coupled with experience unfavorable to the government (working with the homeless), Juror 13 had additional positive characteristics that the government valued.

She had a brother who had been a police officer for 12 years and a friend who had recently joined the United States Air Force Judge Advocate General Corps.

Jurors 3, 23, and 33 each received the government's lowest grades of "D." Yet these three lowest-graded jurors were all white men. This further undercuts the district court's general view that the government was trying to load the jury with white jurors and exclude minorities from the jury. The government did not use peremptory challenges on Jurors 3, 23, and 33 because all three were excused for cause.

Juror 3 said that he would have a difficult time being fair and impartial. Juror 23 returned late from a break and responded during in-court voir dire that he had a hard time following presentations or concentrating when information was presented to him. Jurors 3 and 23 fall into the category of lacking white-collar experience and a college education and it appears that the government doubted their abilities to follow the case. It is understandable that the government would place these jurors at the bottom of its list of jurors.

Juror 33 further illustrates these points. Juror 33 was a white male with white-collar experience and a college education, but still received a "D" grade from the government. Juror 33 was a patent attorney but merited a "D" grade because he informed the court that he had plans to leave the country for business in a few days. This was a significant distraction to him

and consequently made him an undesirable juror to the government. Although the government did not have to use a peremptory challenge to strike him—Juror 33 was excused for cause—it demonstrates both that the government considered individual factors beyond education and work experience and also that the government was consistent in making nondiscriminatory determinations.

Looking at the totality of circumstances also helps to explain why the government struck Jurors 1 and 27. Juror 1 was a 31-year-old single Hispanic woman with no children, from the northwest side of Chicago. Both the government and Stephens used a peremptory strike to exclude her. She had a GED education with some college courses in accounting, and had attended a vocational banking school. She worked as a postal worker for four years. During in-court voir dire, she disclosed that her aunt was a police officer for twelve years in the Chicago Police Department, Narcotics Division. Juror 1 was a victim of a crime—she had a chain stolen from her neck. Her brother, for reasons unknown to her, was under house arrest at a prior time. She also testified on behalf of a defendant in a statutory rape case. The testimony was more than ten years earlier and involved the age of the alleged victim. She said that she could be fair to all sides involved in the case. The government gave Juror 1 a "C-" grade.

The government explained that it struck Juror 1 because she had a blue-collar job, lacked a college degree, and also had various other characteristics

that were a concern to the government. The government was concerned with the fact that she was a postal worker. Government counsel explained that he had interviewed postal workers prior to the Stephens case in relation to another case. He found the postal workers generally hostile to the government. Government counsel also explained that this was consistent with the hostility that other prosecutors had experienced. The government also explained that it was concerned that Juror 1 had appeared as a defense witness in a prior trial.

The government's notes substantiate its explanations. The government circled the answer on Juror 1's jury questionnaire where she listed that she was a postal worker. The government's notation also states that Juror 1 "testified *for* defendant," supporting the government's statement that it considered this a negative factor. In the end, Juror 1 was struck by both sides.

Juror 27 was a 39-year-old married African-American woman from the south side of Chicago, with one child. She had a diploma in diesel mechanics from the American Diesel Institute and had taken one year of business courses at Chicago State University. She had worked for sixteen years as a bus service supervisor for the Chicago Transit Authority. Juror 27 explained during questioning, "I fix a lot of buses."

The government gave Juror 27 a "B-" and exercised a peremptory challenge to excuse Juror 27. In

explaining its peremptory challenge, the government noted that she lacked white-collar experience and a college degree. The government also explained that it was concerned "because her background suggested that she had the potential to hang the jury." The government felt that Juror 27 "was likely to be strong-willed because, as a supervisor of a bus mechanics, she was used to making strong-willed people follow her orders." Being a strong-willed person was a concern to the government because this might make it more likely that Juror 27 would remain a holdout or try to convince others to join her views should she determine that the defendant was not guilty.

The government's notes also demonstrate how the government differentiated and subdivided the class of jurors who lacked white-collar experience and a college education. The government needed to further subdivide within the group of non-white-collar, non-college-educated jurors, because this category represented a majority of the jurors. For example, the government found Juror 2 acceptable because of her significant connection to law enforcement—she was an office manager at a police union and had several friends in law enforcement. Juror 11 had been in the Army, had mentioned his experience as a utility inspector, discussed a criminal investigation in which he participated while at the utility, and spoke of his nephew who was involved in law enforcement. The government noted that Juror 16 was "blue collar"—he worked for a power company providing power to new homes--and had a high

school education. However, Juror 16 received a "B+" grade in part because of his four years in the Marine Corps and cousins who were in law enforcement. Juror 20 received a "B-" grade. Although he worked in a factory and had a high school education, Juror 20 was going back to school for a business degree at the age of 50.

The government also explained that because of the sophisticated nature of ARTES and Accenture's accounting practices, it focused on the jurors' comprehension abilities, as demonstrated in their written and oral responses during voir dire. The government explained that:

> [S]pelling, grammatical, and comprehension errors that the government noted stood out because the jurors did not have the chance to say or write much. The juror questionnaires did not ask for long written answers, nor did most jurors provide them. Similarly, most of the prospective jurors said little because most of the Court's questions were on paper. Accordingly, if an individual [prospective juror] made repeated and/or glaring mistakes during the voir dire, the government viewed that as compelling evidence of the juror's inability to understand the government's case.

Ability to understand was a key factor in the government's peremptory challenges against Jurors 9, 21 and 36.

Juror 9 was a 39-year-old single Hispanic man from Berwyn, with no children. He worked for five years at a cardboard-box factory, and before that drove a forklift for eleven years. He lived with his retired parents. He received a GED and was attending heating and air-conditioning classes at Morton College. The government noted misspellings on Juror 9's questionnaire. Juror 9's answer to Question 13 ("What are your hobbies and spare time activities?") was: "going to scool for a carrer." The government counsel underlined "HVAC" and also made a notation, "Can he read?" The government gave him a "C" and exercised a peremptory challenge. The government explained that it exercised a peremptory challenge on Juror 9 because his lack of education and white-collar experience, along with his juror questionnaire answers, led the government to conclude that he would likely be unable to understand the government's case.

Juror 21 was a 28-year-old, married Hispanic American man from Franklin Park, with one child. He had a high school education and worked for four years as a "semiskilled technician" at a car dealership. He had previously worked as a car-accessory installer, and had jobs at a bakery and fast-food restaurant. The district court engaged in the following exchange with Juror 21:

> DISTRICT COURT: You answered yes to the question about knowing someone who worked in law enforcement.

JUROR 21: My brother-in-law.

DISTRICT COURT: Your brother-in-law, does he work for a police department.

JUROR 21: No. He is armed service. After 911 he got called in to be security at O'Hare Airport.

DISTRICT COURT: Is he still doing that?

JUROR 21: After the Army, he got out of there, he applied to be a federal agent.

DISTRICT COURT: Is he working there now?

JUROR 21: Not no more. He got called in for- he had to go to Iran.

DISTRICT COURT: So he was with the Army Reserves, and he worked for a time for whatever they call that agency who handles the security at O'Hare, and now his unit has been called up.

JUROR 21: Right.

The government gave Juror 21 a grade of "C." It also made notations of "blue" and "language" in its notes. On remand, the government explained that it challenged Juror 21 because he lacked white-collar experience and a college degree, but also "because he made so many grammatical and comprehension mistakes in the limited time he was questioned

during the voir dire that [this] raised doubt about his ability to understand the government's case."

Juror 36 was a 43-year-old, single African American woman from the south side of Chicago, with no children. She had a high school education and worked in home health care. She had previously been a typist for the Social Security Administration and the Chicago Police Department. She disclosed that she had a brother who had been in and out of jail for burglary. The district court had the following exchange with Juror 36 during in-court voir dire.

> DISTRICT COURT: What does Attis Health Care do?
>
> JUROR 36: They employ homemakers and different-to go to patients-sick people and take care of them.
>
> DISTRICT COURT: It is home health care basically?
>
> JUROR 36: Yes.
>
> DISTRICT COURT: Got it. And you worked for the Chicago Police Department at some point?
>
> JUROR 36: Years ago.
>
> DISTRICT COURT: What did you do there?

JUROR 36. I typed. I typed up the records. Criminal arrests I typed.

DISTRICT COURT: Okay. And so you obviously knew a lot of people who worked for the Chicago Police Department. Do you have any relatives or close friends who are with law enforcement now?

JUROR 36: Not that I know of.

DISTRICT COURT: Do you think that you could be fair to both sides in considering and weighing the testimony of a law enforcement officer?

JUROR 36: I don't understand the question.

DISTRICT COURT: If you heard a law enforcement officer testify in this case here, do you think that you could be fair to both sides in considering that person's testimony?

JUROR 36: Yes.

DISTRICT COURT: Do you think that you would tend to give that police officer or law enforcement officer's testimony more weight just because they happen to be a law enforcement officer?

JUROR 36: No.

DISTRICT COURT: You applied for a job with law enforcement. That is obviously the police department. Is there any other job with law enforcement that you have applied for other than your job with the police department?

JUROR 36: No. Maybe the sheriff.

DISTRICT COURT: You may have applied for a job with the sheriff?

JUROR 36: I would like to.

DISTRICT COURT: You would like to. In a similar capacity, the same type of job you had with the police department?

JUROR 36: I would like to be an officer. I would type for the police.

DISTRICT COURT: Have you ever actually applied to be a law enforcement officer? Is that just something you have thought about?

JUROR 36: Something I thought about.

The government gave Juror 36 a "B-." It also wrote "comprehend" and "didn't get the question" in the notes. The government explained that it struck Juror 36 because of her work experience, level of education, and statements made during voir dire. It was also concerned that she had written "health care aid" on the questionnaire. Additionally, the government was

troubled with Juror 36's responses during the in-court voir dire and her brother's criminal history.

As to Jurors 9, 21, and 36, the government was obviously concerned about their ability to comprehend and follow what was going on in the case in light of their in-court voir dire responses. Nevertheless, the district court again dismissed these concerns as pretextual.

The court noted that Juror 11, a white man, had made errors on his questionnaire and had difficulty following in-court voir dire, yet he was not struck by the government. The district court also took the blame for Juror 36's confusion saying that he "threw her a curve ball" follow-up question causing this concern. Nevertheless, the expressed basis for the government's strike of Juror 36 was a valid non-discriminatory reason—the juror's inability to comprehend the questions asked by the judge. That same concern was present with regard to Jurors 9, 21 and 36.

As discussed above, Juror 11 had other factors that the government found favorable including his time in the military and connection to law enforcement. Regardless, the government's explanation for excusing Jurors 9, 21, and 36 was that they had difficulty understanding what was going on in court, a non-discriminatory explanation under step two, and therefore the district court was wrong to dismiss this as pretextual.

When the record is considered in its entirety, it shows that the government exercised its peremptory challenges in a non-discriminatory manner. What remains of the district court's conclusion is merely that it sees a large percentage of minority jurors excluded. This fact, as the majority discussed in *Stephens I*, supports a *prima facie* finding under step one of the *Batson* analysis.

However, when the government provided its explanations under step two, the district court was responsible for considering these explanations along with the record in total to determine if there was evidence of intentional discrimination. The district court did not complete this task. Instead, it revisited the step one analysis and went no further. The district court was required to apply all three steps of the *Batson* analysis.

This error is understandable on some level due to the tortured path taken by this case. If the *Batson* issue had been addressed *during the in-court voir dire* much of this could have been avoided. The government would have been able to present its explanations and supporting *721 notes immediately, when the record was still fresh in the district court's mind. Unfortunately, the image of a jury composed of all white members, except for one Hispanic member, deliberating on the fate of an African American defendant, appears to have weighed on the district court's perception of discrimination and ultimately overwhelmed any legitimate alternative view.

CONCLUSION

The decision of the district court finding a *Batson* violation and granting the defendant's motion for a new trial is REVERSED; the defendant's convictions are reinstated and AFFIRMED. Because the defendant was sentenced under the then-mandatory sentencing guidelines, we now order a LIMITED REMAND pursuant to our decision in *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005), so that the district judge can communicate to us whether he would have imposed the same sentence on the defendant had he known that the sentencing guidelines were advisory instead of mandatory.

ROVNER, Circuit Judge, dissenting.

The district court in this case properly analyzed the *Batson* issue, and the majority's treatment of that district court opinion is so dismissive of the district court that I must write separately to express my disagreement. The majority is only able to reverse the district court by: (1) declaring that the district court was so unaware of the record before it that deference to its decision is no longer due; and (2) usurping the role of the district court by refusing to remand the case and instead deciding the issue for ourselves. There is no basis for either conclusion. The majority opinion mischaracterizes the district court opinion in concluding that the district court failed to consider all of the factors, and the opinion as a whole evidences a disregard for the district court's analysis and its role. Accordingly, I dissent.

The majority recognizes that it is the role of the district court at step three of the *Batson* inquiry to evaluate the credibility of the race-neutral explanation and that the role is so significant that we will not overturn those findings unless they are clearly erroneous. *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006). The majority end-runs that deferential review by stating that the district court opinion incorrectly recounted much of the record, failed to note material portions, and applied a "litmus test" to the *Batson* issue which exclusively focused on the factors of white collar experience and college education. Majority Op. at 713-14. By holding that the district court did not factor in material portions of the record, the majority concludes that the district court is owed no deference in its application of *Batson*. The majority then goes one step further, and declines to remand the case to allow the district court to consider the record in its entirety, instead concluding that the record presents only one plausible conclusion, which is that no *Batson* violation is present.

It is true that the district court focused predominantly on two factors—work experience and ability to understand the case—in evaluating whether the race-neutral explanations were pretextual. That focus was appropriate because the government quite clearly identified those factors as the primary reasons for its challenges. Indeed, the government in the district court devoted the first 12 pages of its Government's Statement of Reasons (hereinafter "Govt. Reasons") to explaining why

classifications based on work experience and ability to understand the case are race-neutral and are proper factors for exercising the peremptory challenges. It is not until later in its argument that the government even explored other related factors. In fact, the government in its arguments to the district court repeatedly identified those two factors as predominant, beginning with a section entitled "The Government's General Approach to Striking Jurors," in which the government stated:

> there were two factors that the government considered to be particularly significant in this case: (1) the juror's work experience; and (2) the juror's ability to understand the government's case. As a general rule, the government struck prospective jurors who lacked white collar work experience and who demonstrated the least ability to comprehend the government's case. The importance of those two factors to the government reflected the nature of the case ...

Govt. Reasons at 2-3. The critical importance of those factors was then developed at length, and repeatedly emphasized. In fact, the government declared that "virtually all of the government's strikes are readily explained by the jurors' work experience and ability to understand the case." Government's Reply to Defendant's Response to Government's Statement of Reasons (hereinafter "Govt's Reply") at 12. Regarding the second factor--the ability to understand the case-the government explicitly tied

that to the level of education, declaring: "The government assumed that people with college degrees would be more likely to understand all the nuance of the government's case than people who had less education. Accordingly, as a general rule, the government looked to strike individuals who lacked a college degree." Govt. Reasons at 7.

The district court accurately characterized the government's arguments. The court noted that the government considered to be "particularly significant" the factors of work experience and the juror's ability to understand the government's case. The court in fact quoted the government's own rationale for use of its peremptories and its explanation of those two factors. Regarding the jurors' ability to understand the case, the court quoted the above language concerning the relevance of a college education, and also noted the significant weight the government placed on mistakes jurors made in written and oral responses during voir dire as illuminating the potential jurors' ability to understand the case. The district court properly determined that those reasons provided by the government were race-neutral, but concluded that those factors were not what actually motivated its peremptory challenges.

Thus, the district court appropriately focused on the factors identified by the government as those driving its peremptory challenges. The majority's characterization of that as a "litmus test" that blinded the district court to any other explanations is

simply inaccurate. It is disingenuous to fault the district court for focusing on those factors when it was the government that argued to the district court that "virtually all of the government's strikes are readily explained by the jurors' work experience and ability to understand the case." Govt's Reply at 12. The district court simply quoted the government's own rationale. Nor was the district court unaware of the other factors considered. The district court recognized the government's argument that among those unacceptable jurors lacking college education and white collar experience, the government looked to other factors to decide which jurors were the least desirable. That is because the government did not have enough peremptory challenges to eliminate all of the jurors in that undesirable pool. *See* Govt.'s Reply at 7 ("as 17 jurors lacked a college degree and 9 jurors had no white collar experience, it would have been impossible for the government to strike all the jurors in either category with its 7 peremptory challenges. As a result, the government had to consider additional factors among the jurors who lacked a college degree and/or white collar experience to determine its strikes.")

Contrary to the majority's characterization, the district court in fact acknowledged that the government had identified those other factors as a means to rank the potential jurors in that undesirable pool, ostensibly so that the government could eliminate the least desirable among them. In other words, the work experience and ability to understand were the primary factors in determining

a pool of potential jurors who would all be undesirable to the government. In choosing how to allocate the limited number of peremptory challenges among those undesirable jurors, the government argued that it looked to secondary factors. But the court held that those other factors were ultimately irrelevant, because the numbers made it clear that the government was not doing what it said. The government was not credible in stating that it tried to eliminate the potential jurors who lacked the ability to understand the case and white collar experience. There were eleven jurors who both lacked white collar work experience and either lacked a college degree or allegedly showed confusion on the written and oral voir dire, six of whom were Caucasian and five of whom were African-American or Hispanic-American. The government eliminated only five of them, despite having seven peremptory challenges available to it. If, as it claimed, the government exercised its challenges so as to remove as many potential jurors as possible who lacked white collar experience and the ability to understand the case, then it would have eliminated seven within that group. No claim is made that strategy or other factors required it to retain some peremptory challenges. Nor was the government credible in stating that it looked to other factors to rank the jurors within that group so as to best allocate its challenges among those undesirable potential jurors. If it had, then the bottom seven would have been eliminated. Instead, only five challenges were made to that group that the government had already

identified as undesirable, and all five were against minority jurors, eliminating every minority within that group. The government—despite identifying white collar experience and college education as the most significant factors—did not exercise peremptory challenges against a single one of the six Caucasian prospective jurors who both lacked white collar experience and exhibited an inability to understand the case. Instead, it used one of the two remaining peremptories on an Asian-American potential juror who possessed both white collar experience and a college education, and it left its remaining peremptory challenge unused, allowing on the jury the potential Caucasian jurors who lacked both the white collar experience and the ability to understand the case that the government had deemed so critical.

Far from being unaware of the government's arguments regarding the other factors, the district court was aware of them, but stated that they were irrelevant because the government could not explain why it had failed to use the remaining peremptory on any Caucasian member of that undesirable potential juror group. It was not clearly erroneous for the district court to determine that if those factors were so critical as to explain "virtually all of the government's strikes," it would have at least exercised its unused peremptory challenges against one of the white jurors who lacked white collar experience and the ability to understand the case, instead of eliminating only the minority jurors so situated and leaving the peremptory challenge unused. Thus, there is absolutely no evidence that

the court was unaware of, or failed to consider, the record as a whole, or the government's arguments as a whole. In fact, the district court explicitly acknowledged those other factors. The majority clearly would have not reached the same conclusion, but such a difference of opinion is not a basis for reversal. *Easley v. Cromartie*, 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001); *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Where, as here, the district court properly considered the record and the law as a whole, the district court's decision must be affirmed unless clearly erroneous. The majority cannot avoid that standard by mischaracterizing the district court's opinion and impugning the court. Because the district court properly identified the government's arguments and addressed them in light of the applicable law, it is entitled to deference and should be affirmed.

In fact, even under its non-deferential review, there is no support for the majority's determination that the record yields only one plausible conclusion in the *Batson* challenge. The extensive, subjective weighing of factors, and the conclusion regarding which are important and which are not, that constitutes the bulk of the majority opinion, itself reveals the fallacy of any such argument of inevitability. The majority attempts to lend an aura of objectivity to the process by premising the challenges on the allegedly race-neutral grading system used by the prosecutor, in which some potential minority jurors received high grades and some potential white jurors received low

grades. The majority provides a chart in the Appendix that sets forth those grades to purportedly demonstrate that the government's strikes were based on its race-neutral grading system.

A glance at that chart belies any such easy conclusion. Even assuming, as the majority does, that the grading was done in a race-neutral manner, the chart reveals that the government allowed no one on the jury who scored below a B-, and did not challenge anyone who scored a B or above. For those that scored a B-, however, the result was anything but race-neutral. Five jurors received a rating of B-, three of whom were white and two of whom were African-American. One of those white jurors was excused for cause. Of the potential jurors remaining who had a B grade, the two white candidates were seated as jurors, and the two African-American candidates were dismissed as a result of government peremptory challenges. That is hardly evidence of racially-neutral use of peremptory challenges. Nor did the government have to make such a choice at all. As the district court points out, the government retained an unused peremptory challenge, and thus could have excluded at least one of the remaining jurors graded B-, yet it chose to challenge only the minority jurors with that grade. Tellingly, all of those prospective jurors rated Blacked both white collar experience and a college degree (although one white prospective juror was attending college), and the government nevertheless exercised its peremptories to exclude the minority candidates, but allowed the white prospective jurors to serve despite

retaining an unused peremptory challenge. Although the majority attempts to neutralize that determination with the listing of purported positive and negative factors for the government, the grade itself presumably reflects the government's own weighing of those factors. It remains that among those rated a B-, the available white candidates were allowed to serve and the government used peremptory challenges to eliminate both African-American candidates.

Thus, even using the purportedly neutral grading system that the majority identifies, it does not indicate race-neutrality, and certainly does not establish it to such a degree that we could state that the record presents only one plausible conclusion. The case at a minimum should have been remanded to the district court if the majority believed that the court did not apply the proper legal standard, because the convoluted facts of this case do not lend themselves to a decision by an appellate court of the *Batson* issue as a matter of law. The district court—and more importantly, the defendant—deserved better than that, however, as the district court properly analyzed the record before it. Applying the proper standard of deferential review, the decision of the district court should have been affirmed outright. For that reason, I dissent.

APPENDIX A

Juror Number	Race	Gender	Grade Given by Govt	College Degree	White-Collar Work	Individualized Positive factors for Government	Individualized Negative Factors for Government	Resolution
1	Hispanic	Female	C-	No	No		- testified for defendant in rape case - brother on home arrest - postal worker; government concerned about hostility to prosecution	Government and Defendant Peremptory
2	White	Female	A-	Yes	Yes	- significant connection with law enforcement - office manager at a police union		Seated as Juror

Juror Number	Race	Gender	Grade Given by Govt	College Degree	White-Collar Work	Individualized Positive factors for Government	Individualized Negative Factors for Government	Resolution
15	White	Male	B+	No	No	· putting himself through college · military experience: serving at the time of trial, in the Army National Guard · "open" aboutn uncle's criminal experiences		Seated as Juror
16	White	Male	B+	No	No	· ex-Marine · cousins in law enforcement: applied for law-enforcement jobs		Seated as Juror
17	White	Female	B+	Yes	Yes	· high school teacher		Defendant Peremptory
18	White	Female	A-	Yes	Yes	· loss-control consultant		Defendant Peremptory

Juror Number	Race	Gender	Grade Given by Govt	College Degree	White-Collar Work	Individualized Positive factors for Government	Individualized Negative Factors for Government	Resolution
3	White	Male	D	No	No		· said he would have a difficult time being fair and impartial	Excused for Cause
4	Hispanic	Female	B	Yes	Yes	· associate's degree in accounting; white-collar experience		Seated as Juror
5	White	Male	B+	Yes	Yes	· white-collar experience as a bookkeeper and clerk		Seated as Juror
6	White	Female	B	Yes	Yes	· white-collar experience: administrator at a residential house for disabled adults		Seated as Juror
7	White	Female	B	Yes	Yes	· white-collar work as an accountant-manager assistant		Seated as Juror

Juror Number	Race	Gender	Grade Given by Govt	College Degree	White-Collar Work	Individualized Positive factors for Government	Individualized Negative Factors for Government	Resolution
8	White	Female	A-	Yes	Yes	• white-collar experience: 14 years as an executive assistant for a bank: additional administrative work		Defendant Peremptory
9	Hispanic	Male	C	No	No		• many misspellings on questionnaire: "going to school for a carrier" • government questioned if juror could read	Defendant Peremptory

Juror Number	Race	Gender	Grade Given by Govt	College Degree	White-Collar Work	Individualized Positive factors for Government	Individualized Negative Factors for Government	Resolution
10	Asian	Female	C-	Yes	Yes		- social worker working with homeless: "lefty" - government felt she may hold negative attitudes about law enforcement - government interpreted facial reaction during jury selection as hostile	Defendant Peremptory
11	White	Male	B+	No	No	-worked as utility investigator in fraud case - Army experience - positive impression of law enforcement: relatives in law enforcement		Defendant Peremptory

Juror Number	Race	Gender	Grade Given by Govt	College Degree	White-Collar Work	Individualized Positive factors for Government	Individualized Negative Factors for Government	Resolution
12	White	Male	B	No	No	- two relatives in law enforcement		Seated as Juror
13	Black	Female	A-	Yes	Yes	- Lived in many large cities before Chicago: "Urbane" - had an MBA; worked as a product manager - brother had been a police officer and was now an Air Force JAG		Defendant Peremptory
14	White	Female	A-	Yes	Yes	- sales/accountant executive - government felt that juror was judgmental toward her brother for his criminal conduct		Defendant Peremptory

Juror Number	Race	Gender	Grade Given by Govt	College Degree	White-Collar Work	Individualized Positive factors for Government	Individualized Negative Factors for Government	Resolution
19	White	Female	B+	No	Yes	- real-estate appraiser		Excused for Cause
20	White	Male	B-	No	No	- attending college at the time of trial, at the age of 50, after lifetime of blue-collar work (would likely be unsympathetic to Stephen's lies about his Yale degree)		Seated as Juror
21	Hispanic	Male	C	No	No		- made numerous grammatical and comprehensive mistakes when questioned by court	Government Peremptory
22	White	Male	B+	Yes	Yes	- white-collar work in pharmaceutical sales		Government Peremptory

Juror Number	Race	Gender	Grade Given by Govt	College Degree	White-Collar Work	Individualized Positive factors for Government	Individualized Negative Factors for Government	Resolution
23	White	Male	D	No	No		- had a hard time following things and concentrating	Excused for Cause
24	White	Male	A-	Yes	Yes	- white-collar work as a sales director		Seated as Juror
25	White	Male	B+	No	No	- had worked in law enforcement; relatives in law enforcement and judiciary		Excused for Cause
26	White	Male	B-	No	No	- sister a police officer - said "unfortunately, no" when asked if anyone was arrested for stealing his trucks		Seated as Juror

Juror Number	Race	Gender	Grade Given by Govt	College Degree	White-Collar Work	Individualized Positive factors for Government	Individualized Negative Factors for Government	Resolution
27	Black	Female	B-	No	No		• government felt she had the potential to hang a jury because of her 23 years of experience as a CTA bus mechanic supervisor, worried she would be "strong-willed"	Government Peremptory
28	White	Male	B+	Yes	Yes	• account executive; had previously worked as an auditor		Government Peremptory
29	White	Female	B	Yes	Yes	• white-collar experience as office manager at graphic artist consulting firm		Seated as Juror

Juror Number	Race	Gender	Grade Given by Govt	College Degree	White-Collar Work	Individualized Positive factors for Government	Individualized Negative Factors for Government	Resolution
30	White	Female	B-	No	Yes	· white-collar work as shipping/receiving clerk	· was not sure she could be fair	Excused for Cause
31	White	Male	B+	Yes	Yes	· six years in military · close friend of 25 years was a police officer · dismissive of son's work as public defender for "bizarre clients" · absolved police for role in a civil suit for malicious prosecution		Government Peremptory
32	White	Male	B	Yes	Yes	· Army experience · teacher		Alternate Juror

Juror Number	Race	Gender	Grade Given by Govt	College Degree	White-Collar Work	Individualized Positive factors for Government	Individualized Negative Factors for Government	Resolution
33	White	Male	D	Yes	Yes	- patent attorney	- planned to leave the country in a few days and was distracted	Excused for Cause
34	Black	Male	B	Yes	Yes		- was not sure he could be impartial	Excused for Cause
35	White	Female	B	No	Yes	- worked as a hospital admitting representative for 25 years		Alternate Juror
36	Black	Female	B-	No	No		- had difficulty following court's simple questioning during voir dire: did not seem to understand: was confused - had a brother who had been in and out of jail for breaking into houses	Government Peremptory

Juror Number	Race	Gender	Grade Given by Govt	College Degree	White-Collar Work	Individualized Positive factors for Government	Individualized Negative Factors for Government	Resolution
37	White	Male	B+	No	Yes	· had previously worked as a fire inspector, building inspector, and police officer	· presented impartiality concerns	Excused for Cause
38	White	Female	B+	Yes	Yes	· white-collar experience as Vice President of Sales	· reported that it would be very difficult to be fair	Excused for Cause
39	White	Male	B+	Yes	Yes	· computer scientist; part-time community college teacher		Defendant Peremptory
40	White	Female	B	Yes	Yes	· social worker at a middle school; government not concerned about a particular ideology associated with this type of social work		Excused

Note:

The district court first considered challenges for causes. After determining the jurors that would be excused for cause, the district court gave each side 15 minutes to consider their peremptory challenges. The government was given seven peremptory challenges and the defendant was given eleven peremptory challenges. Both sides provided their peremptory challenges on a written piece of paper submitted to the district court. The district court noted that both sides exercised a peremptory challenge on Juror 1 and that the government had failed to exercise all of its challenges. Consequently, the district court asked the government if it wanted to exercise another challenge. The government selected Juror 21. Juror 40 was excused because the court had already seated a full complement of 12 jurors and two alternates.

Appendix B

United States District Court, N.D.
Illinois, Eastern Division
UNITED STATES of America
v.
Wayne STEPHENS.
No. 02 CR 661.

June 9, 2006.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge.
A jury convicted Wayne Stephens of wire fraud. For the reasons stated below, the Court grants Stephens a new trial.

Background

On February 21, 2003, a jury convicted Stephens, an African-American man, on three counts of wire fraud for obtaining allegedly unauthorized cash advances from his employer, Accenture. The jury *venire* summoned for Stephens' case consisted of forty persons: thirty-one Caucasians, four African-Americans, four Hispanic-Americans, and one Asian-American. The Court excused nine members of the panel for cause (hardship or inability to be fair): eight Caucasians and one African-American. That left thirty-one prospective jurors: twenty-three Caucasians, three African-Americans, four Hispanic-Americans, and one Asian-American.

Following our rulings on the cause challenges, the Court gave each side time to prepare a list of the prospective jurors it wished to challenge peremptorily. In accordance with our usual practice, each side prepared its list without knowing which jurors the other side was challenging. Because the Court was selecting two alternate jurors, the government had seven peremptory challenges, and Stephens had eleven. *See* Fed.R.Crim.P. 24(b)(2) & (4)(A).

The government initially exercised five of its seven challenges, using all five to strike members of racial and ethnic minority groups: two African-Americans, two Hispanic-Americans, and one Asian-American. Stephens exercised all eleven of his challenges, striking nine Caucasians, the remaining African-American, and one of the Hispanic-Americans whom the government had stricken. The Court advised the parties that there had been an overlapping challenge. Because the government had not used all of its peremptory challenges, the Court advised the government that it could use an additional strike. The government did so, striking another Hispanic-American from the jury panel. The government did not use its seventh strike.

In short, the government used all six of the strikes it exercised to excuse members of racial and ethnic minority groups. Stephens' appointed trial counsel interposed no challenge to any of the government's peremptory strikes. As a result of the parties' peremptory challenges, the jury that heard and

decided Stephens' case consisted of eleven Caucasians—four women and seven men—and one Hispanic-American woman. Two Caucasians served as alternates. As indicated earlier, the jury convicted Stephens on all of the charges against him.

After Stephens was convicted, his trial counsel moved for a judgment of acquittal, raising various issues but no attack on the government's use of its peremptory challenges. Later, during the Court's consideration of Stephens' motion, we raised *sua sponte* the issue of whether the government had exercised some or all of its peremptory challenges to exclude racial or ethnic minorities from the jury, in violation of *Batson v. Kentucky*, 476 U.S. 89 (1986), and its progeny. The Court initially ordered the government to explain each of its strikes. The government moved for reconsideration of that order, arguing that the Court lacked jurisdiction to raise the issue. The Court granted the government's motion and vacated the order, concluding that we lacked the authority to raise a basis for a new trial once the deadline for the defendant to file a motion for a new trial had passed. *United States v. Stephens*, No. 02 CR 661, 2003 WL 21439862, at *1-2, 4-5 (N.D. Ill. June 20, 2003). The Court denied the motion for new trial filed by Stephens' counsel.

New counsel was appointed to represent Stephens on appeal, and the new attorney raised the *Batson* issue in Stephens' opening appeal brief. The government elected to waive the argument that Stephens had forfeited his *Batson* objection. As a result, the Court

of Appeals considered the issue on its merits. The Court of Appeals concluded that Stephens had established a *prima facie* case of discrimination under *Batson* and remanded the case to this Court for determination of the government's reasons for its peremptory challenges and evaluation of whether those reasons were a pretext for intentional discrimination. *United States v. Stephens*, 421 F.3d 503, 518 (7th Cir. 2005). Following remand, the parties briefed the remaining issues extensively, making the matter ripe for decision.

Discussion

To determine whether a party has used a peremptory challenge to exclude a prospective juror on the basis of race or national origin, a court engages in a three step inquiry. The party alleging the violation must first make a *prima facie* showing of discrimination. Once such a showing is made, the party that exercised the peremptory challenge must articulate a nondiscriminatory reason for the challenge. If this is done, then the party alleging the violation bears the burden of proving intentional discrimination. *See Batson*, 476 U.S. at 95-96. At this stage, the party alleging the violation "may offer additional evidence to demonstrate that the [other party's] proffered justification was pretextual or to otherwise establish that the peremptory strike was motivated by a discriminatory purpose." *Stephens*, 421 F.3d at 510 (citing *Batson*, 476 U.S. at 98). The showing must be made by a preponderance of the evidence. *See Rodriguez v. Schriver*, 392 F.3d 505, 509 n. 8 (2d Cir.

2004) (citations omitted); *McKinney v. Artuz*, 326 F.3d 87, 98 (2d Cir. 2003); *Roberts ex. rel. Johnson v.Galen of Va., Inc.*, 325 F .3d 776, 780 (6th Cir. 2003) (citations omitted).[1]

Because the Seventh Circuit has already ruled that Stephens has made the necessary *prima facie* showing, we begin with the government's stated approach to jury selection in this case. The government says "there were two factors that [it] considered to be particularly significant" in exercising its peremptory challenges: "(1) the juror's work experience; and (2) the juror's ability to understand the government's case." Govt's Statement of Reasons at 2.

As to its first stated criterion, the government says that

> [a] critical piece of the case against Stephens relied on arguments about the norms of a white collar work environment. The government believed that jurors who understood those norms from their own work experience would readily understand that no employee of Accenture could believe that

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[1] Stephens sought an evidentiary hearing so that he could cross-examine the government regarding the actual reasons for its peremptory strikes. The government objected, arguing that Stephens had ample opportunity to review trial transcripts, audiotapes of jury selection, juror questionnaires, and the government's notes. The Court agreed with the government and declined to conduct an evidentiary hearing.

> Accenture permitted Stephens' actions. Conversely, the government was concerned that jurors who lacked white collar experience would be more vulnerable to Stephens' anticipated argument about what he believed Accenture permitted. Accordingly, the government used its peremptory challenges to strike, with one exception, individuals who lacked white collar work experience.

Id. at 3-4.

As to its second stated factor, the government notes that its case was largely circumstantial and that some of the inferences it relied upon were technical and complicated, and as a result it was "concerned that jurors who did not comprehend these arguments would conclude that the government had not met its significant burden of proof." *Id.* at 6. The government says that one way it assessed the jurors' ability to understand its case was to look at their level of education. The government assumed that people with college degrees would be more likely to understand all the nuances of the government's case than people who had less education. Accordingly, as a general rule, the government looked to strike individuals who lacked a college degree.

Id. at 7 (citations omitted). The government says that it "also placed significant weight on mistakes the jurors made in their written and oral responses during *voir dire* when assessing the jurors' ability to understand the government's case." *Id.* "[I]f an

individual made repeated and/or glaring mistakes during *voir dire*, the government viewed that as compelling evidence of the juror's inability to understand the government's case." *Id.* at 8.

The two criteria the government cites as its primary motivating factors in exercising its peremptory challenges are both "'clear and reasonably specific,'" and are, on their face at least, race-neutral and national origin-neutral. *See Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 2324 (2005) (quoting *Batson*, 476 U.S. at 98 n. 20); *Hernandez v. New York*, 500 U.S. 352, 360 (1991).

This is not, however, the end of the story; the Court is required to assess the government's stated reasons for its actions in determining whether the defendant has met his burden of proving that the government intentionally discriminated. *See Miller-El*, 125 S .Ct. at 2331. This third step of the *Batson* inquiry focuses on whether the government's articulated reasons hold up under close scrutiny. The Court's finding on whether the government exercised a peremptory challenge in a discriminatory manner "largely ... turn [s] on evaluation of credibility," *Hernandez*, 500 U.S. at 365, which "can be measured by how reasonable, or how improbable [the government's] explanations are, and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El*, 125 S.Ct. at 2329. As noted earlier, the third step of the *Batson* inquiry typically consists of assessing whether the stated justification

for the government's action is pretextual. *Batson*, 476 U.S. at 98; *Stephens*, 421 F.3d at 510.

Even if some of the government's peremptory challenges were justifiable, that does not immunize the others from scrutiny. Stephens' conviction must be reversed "if even one potential juror [was] excluded for impermissible reasons." *Coulter v. Gilmore*, 155 F.3d 912, 919 (7th Cir. 998) (citing *J.E.B. v. Alabama*, 511 U.S. 127, 142 n. 13 (1994)). Because the "right to nondiscriminatory jury selection procedures belongs to the potential jurors, as well as to the litigants," "[t]he exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *See J.E.B.*, 511 U.S. at 142 n. 11. *Id.*

The Court rejects Stephens' facial attack on the criteria cited by the government. Stephens argues that the government cannot, consistent with the Constitution, systematically strike working-class jurors. *See Thiel v. Southern Pacific Co.*, 328 U.S. 217, 222-25 (1946) (wholesale exclusion of working class from jury *venire* violates equal protection). This argument confuses the standards for assessing exclusions of groups from the jury *venire* with those for assessing the exercise of peremptory challenges against members of the *venire*. The Supreme Court has made it clear that "[p]arties may exercise their peremptory challenges to remove from the *venire* any group or class of individuals normally subject to 'rational basis' review.'" *J.E.B.*, 511 U.S. at 143, a category that unquestionably includes blue collar

jurors and those without college educations. Indeed, the Seventh Circuit has consistently upheld peremptory challenges based on education and work experience. *See, e.g., Alverio v. Sam's Warehouse Club, Inc.*, 253 F.3d 933, 940 (7th Cir. 2001); *United States v. Marin*, 7 F.3d 679, 686-87 (7th Cir. 1993). *See also, United States v. Tucker*, 773 F.2d 136, 141 (7th Cir. 1985) (holding lack of education and commercial experience were race-neutral reasons for peremptory strikes in wire fraud case).

The Court does not find credible, however, the government's contention that the two factors it cites are what *actually* motivated its peremptory challenges. Upon review of the evidence, the Court agrees with Stephens' argument that the government's actions are inconsistent with its stated justifications and that the government applied its stated criteria unevenly as between members of racial and ethnic minority groups on the one hand, and Caucasians on the other. For these reasons, the Court concludes, after assessing the evidence, that Stephens has shown by a preponderance of the evidence the factors the government cites are a pretext for discrimination based on race and national origin as to at least some, and perhaps all, of the jurors it struck peremptorily.

In this regard, the Court recognizes that there is no such thing as a two-dimensional juror. "Picking jurors is a complex and multifaceted process. Individual factors or characteristics often do not provide the 'silver bullet' that will mean acceptance

or rejection of any potential juror. Rather, it is a combination of factors that will determine whether a party believes a juror will be favorable to their side." *Pruitt v. McAdory*, 337 F.3d 921, 930-31 (7th Cir. 2003).[2] But the government has cited these two criteria as, in its own words, the "two factors that [it] considered to be particularly significant" in exercising its peremptory challenges. Again, the key inquiry under the third step of the *Batson* analysis is whether "the proffered justification was pretextual." *Stephens*, 421 F.3d at 510 (citing *Batson*, 476 U.S. at 98). Thus it is appropriate to begin, and perhaps to end, with assessment of whether the record reflects that the government's stated criteria are actually the criteria it applied, or whether those criteria are a pretext for discriminatory exercise of the government's peremptory challenges.

If one takes at face value the government's identification of the factors it "considered to be particularly significant," after cause challenges were ruled upon, there were eleven prospective jurors who both (a) lacked white collar work experience and (b) lacked a college degree or allegedly showed confusion in the written and oral *voir dire*. Specifically, there were eleven prospective jurors "lack[ing] white collar work experience," Govt's Statement of Reasons at 4: jurors 1, 9, 11, 12, 15, 16, 20, 21, 26, 27, and 36.

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[2] The fact that no person is two-dimensional also makes it relatively easy to posit, after the fact, grounds for differentiating one juror from the other, even if those were not the grounds actually used by the party in jury selection.

Each of these jurors also "lacked a college degree," *id.* at 7, though two of them, jurors 15 and 20, were attending college at the time of jury selection.[3] The jurors who the government contends exhibited some degree of confusion during jury selection—jurors 9, 21, and 36—are among this same group. In short, there were eleven jurors who failed to meet the government's key criteria for jury membership. Of these, six were Caucasian (jurors 11, 12, 15, 16, 20, and 26); two were African-American (jurors 27 and 36); and three were Hispanic-American (jurors 1, 9, and 21).

As the government accurately points out, the number of prospective jurors who fit the government's stated criteria for exclusion exceeded the number of peremptory challenges it had available. Thus the government necessarily would have had to use additional criteria to distinguish among the eleven prospective jurors identified above to determine which ones to strike. The key problem with the government's explanation, however, derives from what is essentially the flip side of this same point: the government did not use the peremptory strikes that it had available to excuse as many jurors as possible that met its stated criteria for exclusion. As

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[3] Juror 20 was a fifty year old "shift advisor" at Midwest Generation, a successor of Commonwealth Edison Co.; the government treats him, accurately, as a blue collar juror, albeit one who was attending college at the time of trial. *See* Gov't Reply at 8. Juror 15 was a twenty-three year old male who had a blue collar job but likewise was attending college at the time of trial.

discussed below, this is powerful evidence that the government's stated criteria are pretextual, or to put it another way, are not the true reasons for the peremptory strikes the government made. *See Volovsek v. Wisc. Dept. of Agric., Trade & Consumer Prot.*, 344 F.3d 680, 692 (7th Cir. 2003) (defining pretext in the Title VII sex discrimination context); *O'Neal v. City of New Albany*, 293 F.3d 998, 1005 (defining pretext in the Americans with Disabilities Act context).

If the government had acted consistently with its stated key criteria, it would have used all seven of its available challenges to strike jurors who lacked a college degree and white collar work experience. But instead, the government initially struck only four of the nine jurors who failed to meet its key criteria: jurors 1, 9, 27, and 36.[1] *Each one of these jurors was a member of a racial or ethnic minority*: jurors 1 and 9 were Hispanic-American, and jurors 27 and 36 were African-American. In addition, the government used one of its challenges to strike juror 10, a woman with a white collar job who had obtained a college degree and attended graduate school and who accordingly did not meet either of the government's stated criteria for exclusion. Juror 10 was also a

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[1] Though the defense struck one of the nine jurors in question, juror 11, a white male, this does not help the government: as noted earlier, each side prepared its list of peremptory strikes in the blind, without knowing who the other side was striking. The government also notes that the defense also struck juror 1, a Hispanic-American female, but again this misses the point: we are assessing the government's challenges here.

member of an ethnic minority: she was Asian-American. Finally, and significantly for present purposes, the government left two of its available challenges unused in the initial go-round. Had the government *actually* been acting in accordance with its stated criteria, it would have used these available challenges to strike two among the several remaining prospective jurors who lacked white collar work experience and a college degree. But it did not do so.

When the government was told it could exercise an additional challenge, six of the jurors who met its stated criteria for exercise of a strike remained on the panel: jurors 12, 15, 16, 20, and 26, all of whom were Caucasian, and juror 21, who was Hispanic-American. The government used its additional challenge to excuse juror 21, the single member of this remaining group who was a member of an ethnic minority group.

To summarize, of the eleven prospective jurors who met the government's claimed criteria for exclusion, five were left on the jury. All five were white males. The government could have excused two of the five had it actually been acting in conformity with its key criteria, but instead it used one of those strikes to excuse an Asian-American juror with white collar employment and a college degree, and it left the other strike on the table without using it.

In short, the government's claim regarding the key criteria it used is contrary to the actions it took

during the jury selection. The Court does not find credible the government's contention that it applied those criteria but rather finds that they are being used as a pretext for prohibited discrimination.

We also note that even if the government did in some way apply those criteria during jury selection, it applied them only to prospective jurors who were from racial and ethnic minority groups. Each of the five strikes the government exercised against a non-white collar, non-degreed juror was used against a member of a minority group-as we have stated, two African-Americans, three Hispanic-Americans, and one Asian-American. The government did not exercise peremptory challenges against a single one of the six Caucasian jurors-jurors 11, 12, 15, 16, 20, and 26-who lacked both a college degree and white collar work experience. When a decision maker's actions do not comport with its stated reasons-and the actions fall more heavily on members of racial or ethnic minorities-that is evidence the stated reasons are a pretext for unlawful discrimination. *See Miller-El*, 125 S.Ct. at 2325-32 (finding prosecutor's proffered reasons for striking African-American jurors were pretextual where they were equally applicable to Caucasian and Hispanic-American jurors who were not challenged). Similarly, a decision maker's application of stated criteria to members of a racial or ethnic minority but not to Caucasians is strong evidence of discrimination. *See Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 290-91 (1999) (reversing grant of summary judgment in Title VII race discrimination case because employer

had fired African-American employee for gross misconduct but had retained Caucasian employee who engaged in comparable conduct); *see also Coulter*, 155 F.3d at 921 (finding that trial court erred in rejecting *Batson* challenge where it failed to consider prosecutor's acceptance of Caucasian jurors who had the same characteristics as excluded African-American jurors).

The Court is unpersuaded by the government's argument that the fact that it did not strike two jurors who were members of minority groups supports its contention that it did not exercise any peremptory challenges based on race or national origin. The government cites its acceptance of Juror 4, a Hispanic-American woman with an associate's degree who had worked at three white collar jobs, and Juror 13, an African-American woman who had earned an MBA degree and had worked at several white collar jobs.[5] *See* Gov't Reply at 9-10. The government contends that had it been motivated by race, it would have used its remaining peremptory challenge to strike one of these jurors. The Court acknowledges that a party's non-use of peremptory challenges often is evidence tending to support a contention that it did not make discriminatory use of its strikes. *See United States v. Smith*, 324 F.3d 922, 927 (7th Cir. 2003) (discussing government's use of final peremptory challenge to strike white juror rather than the single remaining black juror). But in

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[5] Juror 4 was the only member of a minority group who sat on the jury that heard the case. The defense struck Juror 13.

this case, it is not particularly strong evidence. Indeed, as discussed above, the government's failure to use available challenges to strike prospective jurors who met its stated key criteria for exclusion supports Stephens' argument that those criteria are being used as a pretext for prohibited discrimination. In addition, reliance on the fact that a party did not strike *every* juror of a particular racial or ethnic background as demonstrating the absence of discrimination would, if taken to its logical extreme, undermine the principle established by the Supreme Court in *J.E.B.* that the discriminatory use of even one peremptory challenge violates *Batson*. *Batson* does not require proof that a litigant systematically excluded minority jurors. *See United States v. James*, 113 F.3d 721, 728-30 (7th Cir. 1997). Each juror has an equal right to sit, *Powers v. Ohio*, 499 U.S. 400, 407-10 (1991); excluding any one juror in violation of the Equal Protection Clause requires a remedy under *Batson*. *James*, 113 F.3d at 730 ("*Batson* demands that a prosecutor give a race-neutral reason every time he wants to peremptorily challenge an African-American person from the jury, no matter how many African-Americans remain."); *United States v. Ferguson*, 935 F.2d 862, 865 (7th Cir. 1991) ("It is the striking of a single black juror for racial reasons that invokes the shelter of the Equal Protection Clause, even though other black jurors are impanelled.").

The government has offered distinctions among the non-white collar, non-college degreed jurors that it contends make those who were not struck more

desirable jurors from its perspective than those who were struck. But again, this misses the primary point. What the government has not explained, and cannot adequately explain, given its stated key criteria for jury selection, is why it failed to strike any of the remaining white jurors who met those criteria, even though it had enough strikes to eliminate at least some of them.

Though it is not essential to our conclusion that Stephens has proved his *Batson* claim, we also note that there is a significant body of research reflecting that when jurors may be affected in their deliberations by racial stereotyping, nominal minority representation on the jury is insufficient to overcome the potential for racial bias. We note first that contrary to the government's contention in its briefing on the *Batson* issue, race was, or at least could have been expected to be, an issue in this case. As the Seventh Circuit stated in its decision remanding the case, the jury "had to determine the credibility of an African-American defendant in characterizing his conduct as a white-collar employee, weighed against contrary testimony by Caucasian employees. There is no reason to believe that a jury would be immune to those racial stereotypes in determining or analyzing motives, or that a prosecutor would not see an advantage in an all-white jury in this case." *Stephens*, 421 F.3d at 515.

Social science research supports the proposition that in a case in which race and/or racial stereotyping

may be an issue, "minority jurors must constitute a critical mass so as not [to] be overwhelmed by the majority." *See* D. Baldus, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Penn. J. Const. Law 3, 170 (2001) (citing R. Roper, *Jury Size & Verdict Consistency: A Line Has to Be Drawn Somewhere*, 14 Law & Society R. 977, 988 (1980); K. Klein & T. Klastorin, *Do Diverse Juries Aid or Impede Justice?*, 1999 Wisc. L.Rev. 553, 561; D. Wilder, *Homogeneity of Jurors: The Majority's Influence Depends Upon Their Perceived Independence*, 2 Law & Hum. Behav., 363 (1978)); S. Johnson, *Black Innocence and the White Jury*, 83 Mich. L.Rev. 1611, 1698 (1985) (citing studies); *see also* J. Francis, *Peremptory Challenges, Grutter, and Critical Mass: A Means of Reclaiming the Promise of Batson*, 29 Vt. L.Rev. 297, 330-31 (2005).[6] In the Court's experience, this notion is a matter of common understanding among trial lawyers.

The Court's finding that the government's stated primary criteria for exercising its peremptory challenges are lacking in credibility and have been used as a pretext for discrimination against racial and ethnic minorities leads us to conclude that Stephens has shown that the government violated *Batson* in exercising its peremptory challenges

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[6] The Court cites these articles not to suggest agreement with the advocacy by the authors of some of them of a racial quota system of sorts for jury membership, but rather for their discussion of the "critical mass" issue.

against one or more of the jurors from racial and ethnic minority groups that it struck. Because even one such strike requires an order for a new trial, this finding and conclusion requires the Court to grant Stephens' motion.

Though our analysis of the *Batson* issue logically could stop here, we will also address certain of the government's arguments for distinguishing between the jurors it struck and those allegedly comparable. Some of those arguments are equally lacking in credibility, and equally pretextual, as the points we have already addressed.

Jurors 9 and 21. The government contends it struck Jurors 9 and 21, both Hispanic-American men, based on concerns they would be unable to understand the government's case. The government points to errors both jurors made on their written questionnaires and difficulties they had answering questions during oral *voir dire*. *See* Gov't Br., Ex. A at 20 (Juror 9: "going to school for a career"), 43 (Juror 21: spouse is "Housewife not employeed"); Tr. 47-48, 74-75.

Peremptory challenges based on mistakes on a jury questionnaire and concerns about the juror's ability to understand are considered race-neutral. *See United States v. Smith*, 324 F.3d 922, 927 (7th Cir. 2003). Stephens contends, however, that the government's stated reasons for striking Jurors 9 and 21 are pretextual, because the government accepted Juror 11, a Caucasian man, despite the fact that he also made mistakes on his written

questionnaire and exhibited difficulty answering the Court's questions during oral *voir dire*. *See* Gov't Br., Ex. A at 23 ("Waltr" and "construstion"); Tr. 50-04.

Though the government attempts to distinguish between Juror 11 on the one hand and Jurors 9 and 21 on the other, it has again missed the point: because it had strikes left, it did not have to distinguish among these jurors. If the government truly was striking jurors who exhibited confusion and thus might not understand the government's case, then it also would have struck Juror 11. The government has failed to identify a persuasive rationale as to why Juror 11's apparent confusion was any less significant than that of Jurors 9 and 21. The Court finds that the "confusion" rationale, as applied to Jurors 9 and 21, is used as a pretext for unlawful discrimination.

Juror 36. The government says it struck Juror 36, an African-American woman who had previously worked for the Chicago Police Department as a typist, because she exhibited difficulty answering the Court's questions during oral *voir dire*, and because her brother had been imprisoned for burglary. *See* Gov't Br., Ex. A at 37; Tr. 11-13. Stephens contends that the record reflects not that Juror 36 misunderstood the Court's questions but rather than she was joking. The following colloquy between the Court and Juror 36 consisted of follow-up on the juror's "yes" response to the written questionnaire's

questions, "Have you every applied for a job with a law enforcement agency":

THE COURT: You applied for a job with law enforcement. This is obviously the police department. Is there any other job with law enforcement that you have applied for other than your job with the police department?

JUROR 36: No. Maybe the sheriff.

THE COURT: You may have applied for a job with the sheriff?

JUROR 36: I would like to.

THE COURT: You would like to. In a similar capacity, the same type of job you had with the police department?

JUROR 36: I would like to be an officer. I would type for the police.

THE COURT: Have you ever actually applied to be a law enforcement officer? Is that just something you have thought about?

JUROR 36: Something I thought about.

Tr. 110-12.

The Court is unpersuaded by Stephens' argument that Juror 36 was trying to make a joke. Based on our own observation of the proceedings, it appeared

that the juror showed some slight misunderstanding of the Court's question, "Is there any other job with law enforcement that you have applied for other than your job with the police department?" It is true that some of the other prospective jurors laughed in reaction to Juror 36's responses, but that does not mean she intended a joke.

On the other hand, we cannot credit the government's contention that what was, quite obviously, apparent momentary confusion on the part of Juror 36 in response to an unexpected verbal inquiry by the Court put her in the same category as a person who made an error when responding to a written question. The two situations cannot reasonably be said to be truly parallel: the jurors were able to review the questions on the written questionnaire and prepare responses in their own time, as they were given whatever time they needed to respond; the Court's verbal questions were unexpected and had to be answered immediately (and the Court has a tendency to speak rather quickly, as our court reporter has often noted). Juror 36's response on the written questionnaire was absolutely accurate; she *had* applied for a job with law enforcement-her typist job with the Chicago Police Department (as the Court pointed out during the oral *voir dire*). The unexpected follow-up question we threw at her was a bit of a curve ball, or at least a hard slider—was there any *other* job with law enforcement for which she had applied? The Court cannot, and does not, credit the government's contention that it struck Juror 36 due to confusion.

We find that this explanation is being used as a pretext for discriminatory use of the peremptory challenges.

In short, Stephens has established by a preponderance of the evidence the government's explanation of its strikes of Jurors 9, 21, and 36 is lacking in credibility and that those jurors were struck due to their race and national origin. Even were the Court to have concluded, in our earlier discussion, that the government's originally stated criteria were the criteria it actually applied, we would nonetheless find the government's exercises of peremptory challenges against these jurors violated *Batson*.

A postscript

The Court recently participated in a project of the Seventh Circuit Bar Association that involved testing, in civil cases, various "innovations" in the jury process. One of these involved the use of written questionnaires during the *voir dire* process as the primary means to obtain information to use in selecting the jury. That particular practice was not actually an innovation; this Court (like others in this District and elsewhere) has been using written questionnaires as the primary element of jury *voir dire* in both civil and criminal cases for several years. The Court's primary experience as a practicing lawyer trying civil and criminal cases was with oral *voir dire*, a practice that remains the norm in this District and elsewhere. Our goal in moving to the

use of written questionnaires was to obtain more information, more efficiently, from the jury *venire*. Rather than each juror answering, one after the other, a series of identical verbal questions, all the prospective jurors can answer a set of written questions simultaneously. This allows the same amount of information to be obtained in less overall time; it also permits more information to be obtained in the same (or less) time that it would take to conduct a more cursory oral *voir dire* if extra inquiries are included in the written questionnaire. In addition, research that suggests that all else being equal, jurors are more likely to answer written questions accurately and honestly than they do if required to respond to the same questions individually in front of a courtroom full of people, a process that prospective jurors often perceive as more intrusive and intimidating. *See, e.g.*, Principles for Juries and Jury Trials 39 (Amer. Bar Ass'n 2005) (citing G. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, 36 Ct. L.Rev. 10-15 (1999)).

Since moving to the use of written jury questionnaires, the Court has continued to use follow-up verbal questioning to supplement the *voir dire* process. In criminal cases, this has largely consisted of two things. First, we pose to the panel as a whole a series of questions of common application (for example, ability to serve given the anticipated length of the trial, willingness to follow jury instructions, etc.), with follow-up questions to jurors whose responses to the group questions call

for further inquiry. And second, we pose follow-up questions to individual jurors to obtain elaboration on answers provided on their written questionnaires (for example, details of prior jury service, follow-up questions about jurors or relatives of jurors who work in law enforcement or have been arrested or charged with crimes).

This Court's experience is that the process we use allows us to obtain more information more efficiently than the more traditional method of oral *voir dire*. The goal of efficiency, however, is sometimes at odds with the goal of obtaining information that is appropriate and necessary to the intelligent exercise of peremptory challenges. A few jurors' written questionnaire responses do not call for much, if any, follow-up; the written responses of many jurors call for only minimal follow-up. Use of written questionnaires as the sole or predominant means of obtaining information from prospective jurors may result in the elimination or minimization of the opportunity to get a sense of how particular prospective jurors communicate and react verbally. That opportunity, if available, can give counsel valuable insight into whether, and how, the juror will understand the evidence in the case and the court's instructions on the law, and how the juror will relate to fellow jurors during deliberations.

Having used written questionnaires in dozens of jury trials over the past several years, the Court has come to believe that if handled properly, they are a better means of obtaining accurate factual information

about prospective jurors that the more common and traditionally used verbal *voir dire* process.[7] But if a judge's use of written questionnaires leads him or her to eliminate or drastically minimize verbal questioning of prospective jurors, this can, in effect, encourage counsel to see and assess the jurors as simply members of the various categories into which they fit-including, among others, racial and ethnic categories. Some stereotyping is inherent in any jury selection process that is developed with efficiency in mind, but in this regard, some processes are "more equal than others."

To put it another way, there is always some tension between efficient trial management (which can degenerate into efficiency for efficiency's sake) and in-depth inquiry (which can degenerate into, as one of our colleagues has put it, "going for the capillary" as opposed to the jugular). Overemphasis of the former can have the effect of encouraging stereotyping on the part of counsel.

The experience of this case is part of what informs our discussion of this point. Review of the transcript of the jury selection process reveals, at least for some prospective jurors, precious little opportunity for counsel to observe the jurors communicating, interacting, and thinking on their feet. The Court is constrained to say that the minimization of verbal interaction that resulted from how we conducted the

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[7] This requires, among other things, the use of questions that are worded very simply.

voir dire in this case likely contributed to the use of a form of stereotyping in the jury selection process, which in the government's case, as we have found, included the use of racial and ethnic criteria in the exercise of its peremptory challenges.

Conclusion

For the reasons stated above, the Court grants Stephens a new trial. The case is set for a status hearing on July 13, 2006 at 9:30 a.m. for the purpose of setting a trial date.

Appendix C

In the United States Court of Appeals For the Seventh Circuit

No. 06-2892

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

WAYNE STEPHENS,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 02 CR 661—**Matthew F. Kennelly**, *Judge.*

APRIL 9, 2008

ORDER

On consideration of the petition for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc and, a majority

of the judges[*] on the panel have voted to deny rehearing. It is, therefore, ORDERED that the petition for rehearing en banc and panel rehearing are DENIED.

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[*] Judge Rovner voted to grant the petition for rehearing.

Appendix D

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U.S.
FILED
SEP 17 2008
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No. 08-35

In the Supreme Court of the United States

WAYNE STEPHENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals' decision rejecting petitioner's claim under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), conflicts with this Court's decision in *Snyder* v. *Louisiana*, 128 S. Ct. 1203 (2008).

2. Whether the court of appeals applied an incorrect standard of review to the district court's decision.

3. Whether the court of appeals erred in declining to remand petitioner's *Batson* claim to the district court for further proceedings.

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In the Supreme Court of the United States

No. 08-35

WAYNE STEPHENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 514 F.3d 703. An earlier opinion of the court of appeals is reported at 421 F.3d 503. The opinion of the district court (Pet. App. 60a-86a) is not published in the Federal Supplement but is available at 2006 WL 1663447.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2008. A petition for rehearing was denied on April 9, 2008 (Pet. App. 87a-88a). The petition for a writ of certiorari was filed on July 8, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on three counts of wire fraud, in violation of 18 U.S.C. 1343 (Supp. V 2005). He was sentenced to 21 months of imprisonment. A divided panel of the court of appeals concluded that petitioner had established a *prima facie* case of racial discrimination in jury selection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and remanded for further proceedings. 421 F.3d 503 (7th Cir. 2005). On remand, the district court found a *Batson* violation and granted a new trial. Pet. App. 60a-86a. A divided panel of the court of appeals reversed and reinstated petitioner's convictions. *Id.* at 1a-59a.

1. Petitioner, an African-American male, was a manager who oversaw computer and technology support for Accenture. Accenture's computerized time and expense report system permitted employees to manually add money to their paychecks in order to take into account legitimate business expenses that were not reflected elsewhere on the standardized expense report. Between April and August of 2000, petitioner used that feature to add approximately $68,000 to his paychecks. Pet. App. 3a. Petitioner's first "add to" request was for $7800 in a month in which he had a legitimate business expense of $78.00. *Id.* at 4a. After Accenture failed to challenge that request, petitioner made a series of "add to" requests that were all just under $10,000. 421 F.3d at 506. He also failed to submit the relevant reports to his supervisor and Accenture's accounting department, as required by company policy. Pet. App. 4a. A jury found petitioner guilty on three counts of wire fraud, and petitioner filed a timely motion for a judgment of acquittal based on insufficiency of the evidence. *Id.* at 5a-6a.

2. More than two months after the jury returned its verdict, the district court issued a *sua sponte* minute order that raised the issue of whether the government had violated *Batson* in selecting petitioner's jury. The court acknowledged that petitioner had never raised a *Batson* objection but believed, contrary to its earlier view, that petitioner had no strategic reason for withholding an objection. Therefore, the court decided that it would address the issue on its own and it directed the government to provide non-discriminatory explanations for its exercise of peremptory challenges in petitioner's case. Pet. App. 6a.

The government responded by arguing that the time for filing a motion for a new trial had expired and that the district court lacked authority to raise a *Batson* issue *sua sponte* at that stage in the proceedings. Pet. App. 6a; see Fed. R. Crim. P. 33(b)(2) (stating that a motion for a new trial "grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict"). The government also provided a variety of non-discriminatory explanations for its use of peremptory challenges that it stated were "apparent in the record." 421 F.3d at 515.

The district court issued a second minute order vacating the first minute order. Pet. App. 6a. The court agreed that it lacked authority to raise the *Batson* issue at that stage but suggested that petitioner should raise the issue by way of a motion for postconviction relief under 28 U.S.C. 2255 (Supp. V 2005). Pet. App. 6a-7a.

3. Petitioner raised a *Batson* claim on direct appeal. 421 F.3d at 510. In its brief, the government affirmatively waived the argument that any *Batson* claim was forfeited and responded to petitioner's argument on the merits. *Id.* at 510.

a. A divided panel of the court of appeals concluded that petitioner had "set forth a *prima facie* case of discrimination," 421 F.3d at 510; see *id.* at 511-518, and it "[r]emanded for further proceedings consistent with this opinion," *id.* at 518 (emphasis omitted). The majority emphasized that its decision did not "imply that the government in fact lacked legitimate non-discriminatory reasons for the choices it made," and it described "the only question before" it as "whether the government should be required to articulate its actual reasons for the peremptory challenges." *Id.* at 517-518.

b. Judge Kanne dissented from the majority's *Batson* holding. 421 F.3d at 518-528. In his view, "[i]t [was] unwise to consider [petitioner's] *Batson* claim in the first instance when he failed to preserve the issue by objection during jury selection, and the district court did not raise the issue until long after it could have fashioned any relief." *Id.* at 518. On the merits, Judge Kanne "d[id] not believe that [petitioner] had established a *prima facie Batson* claim warranting a remand." *Ibid.*

4. On remand, the government provided various non-discriminatory explanations for its peremptory challenges. Pet. App. 8a; see Gov't C.A. App. 24-40. The government also provided its original contemporaneous notes from voir dire. Pet. App. 8a, 24a.

The district court concluded that there had been a *Batson* violation and ordered a new trial. Pet. App. 60a-86a. The court determined that the reasons offered by the government for its peremptory challenges were "clear and reasonably specific" and were "on their face * * * race-neutral and national origin-neutral." *Id.* at 66a (internal quotation marks and citation omitted).

The district court next concluded that petitioner had met his "burden of proving intentional discrimination." Pet. App. 63a; see *id.* at 66a-82a. The court stated that it "d[id] not find credible * * * that the two factors" cited by the government—which it described as "jurors who both (a) lacked white collar work experience and (b) lacked a college degree or allegedly showed confusion [during] the written and oral *voir dire*"—"are what *actually* motivated its peremptory challenges." *Id.* at 68a-69a. The court emphasized that the government had not used all of its peremptory challenges and that the government had not chosen to strike "as many jurors as possible that met its stated criteria for exclusion." *Id.* at 70a. The court acknowledged that "[t]he government ha[d] offered distinctions among the non-white collar, non-college degreed jurors that it contends ma[d]e those who were not struck more desirable jurors from its perspective than those who were struck." *Id.* at 75a-76a. But the district court described that argument as "miss[ing] the primary point" because, in its view, "the government ha[d] not explained" why "given its stated key criteria for jury selection, * * * it failed to strike any of the remaining white jurors who met those criteria, even though it had enough strikes to eliminate at least some of them." *Id.* at 76a.

5. A divided panel of the court of appeals reversed. Pet. App. 1a-59a.

a. The court of appeals stated that "a finding of intentional discrimination is a finding of fact entitled to appropriate deference by a reviewing court." Pet. App. 14a (quoting *Batson*, 476 U.S. at 98 n.21) (internal quotation marks omitted; citation omitted). But the court further stated that "deference is due only when a district court properly performs its task in the first in-

stance." *Id.* at 15a. The court of appeals concluded that it was "unable to defer to the district court's decision finding intentional discrimination" because that decision had "incorrectly recount[ed] much of the record and fail[ed] to note material portions" and had thus "misapplied the *Batson* three-part test." *Id.* at 16a. The court of appeals further stated, however, that "even under a clearly erroneous standard of review, the district court's result would not pass muster." *Id.* at 17a.

The court of appeals next concluded it was unnecessary to remand the case to the district court for further consideration of petitioner's *Batson* claim. Pet. App. 17a-18a. The court stated that it "ha[d] the entire record before [it], and ha[d] reviewed it thoroughly." *Id.* at 17a. Having done so, the court of appeals determined that a remand "would be futile as there is only one plausible conclusion based on the entire record—that there was no *Batson* violation." *Ibid.*

The court of appeals concluded that "[t]he district court's central error was its failure to take into account the government's non-discriminatory explanations for its peremptory challenges." Pet. App. 18a. The court explained that "[a]lthough white-collar experience and a college education were important for the government, the record demonstrates that the government never relied on th[o]se two factors alone." *Ibid.* The court of appeals stated that the district court had erred by: (i) "overemphasi[zing]" those two factors by "transforming" them "into a simple 'litmus test' * * * despite the fact that those two factors were not used in that fashion by the government"; (ii) concluding that the resulting litmus text was pretextual because the white-collar-experience and college-degree factors could not alone explain all of the government's decisions to strike or not

strike individual jurors; and then (iii) "explain[ing] that this new-found pretext was evidence of intentional discrimination." *Ibid.*; see *id.* at 18a-19a. In doing so, the court of appeals concluded that "the district court did not credit the government's strategy in selecting jurors," *id.* at 19a-20a, and had "ignored all of the individual explanations provided by the government" for its decisions whether to exercise a peremptory challenge with respect to a given juror, *id.* at 21a.

The court of appeals then reviewed the "detailed individualized explanations regarding [the government's] strikes of minority jurors." Pet. App. 21a-35a. The court determined that "[t]he government's notes substantiate its explanations," *id.* at 27a, and that "[w]hen the record is considered in its entirety, it shows that the government exercised its peremptory challenges in a non-discriminatory manner," *id.* at 36a.

b. Judge Rovner dissented. Pet. App. 37a-46a. In her view, the majority had erred in not deferring to the district court and in failing to remand the case for further proceedings with respect to petitioner's *Batson* claim. *Id.* at 37a-38a, 46a. Judge Rovner acknowledged that the district court had "focused predominantly on two factors"—which she described as "work experience and ability to understand the case"—but she argued that "[t]hat focus was appropriate because the government quite clearly identified those factors as the primary reason for its challenges." *Id.* at 38a; see *id.* at 38a-40a.

6. Petitioner filed a petition for rehearing. Before the court of appeals acted on that petition, petitioner filed a letter pursuant to Federal Rule of Appellate Procedure 28(j) in which he brought to the court's attention this Court's intervening decision in *Synder* v. *Louisiana*, 128 S. Ct. 1203 (2008). Letter from Barry Leven-

stam & Irina Dmitrieva, Jenner & Block LLP to the Hon. Gino J. Agnello, Clerk, United States Court of Appeals for the Seventh Circuit (Mar. 19, 2008). The court of appeals denied the petition for rehearing after no judge in active service requested a vote on the petition for rehearing en banc and a majority of judges on the panel voted to deny rehearing. Pet. App. 87a-88a.

ARGUMENT

Petitioner contends (Pet. 12-15) that the court of appeals' decision rejecting his *Batson* claim conflicts with this Court's decision in *Snyder* v. *Louisiana*, 128 S. Ct. 1203 (2008). He also asserts that the court of appeals applied the wrong standard of review (see Pet. 15-22) and erred in failing to remand the case to the district court for further proceedings with respect to his *Batson* claim (see Pet. 22-26). The court of appeals' decision does not conflict with the decisions of this Court or any of the other decisions cited by petitioner. In addition, the central disagreement between the court of appeals' majority, on one hand, and the dissenting judge and the district court, on the other, involves the proper interpretation of the government's overall strategy for selecting jurors in this particular case. That factbound dispute does not warrant this Court's review.

1. Petitioner contends that the court of appeals' decision conflicts with *Snyder* in two related respects. First, petitioner asserts that the court of appeals "requir[ed] a finding that all race-neutral reasons proffered by the government were pretextual before a *Batson* violation can be found." Pet. ii; see Pet. 12-14. Second, petitioner argues that the court of appeals "fail[ed] to determine that alternative race-neutral reasons proffered by the government in addition to the reasons which the district

court found pretextual[] motivated its peremptory strikes 'in substantial part.'" Pet. ii; see Pet. 14-15. Petitioner misreads the court of appeals' decision and there is no conflict with *Snyder*.

a. In *Snyder*, a prosecutor had offered two independent explanations for striking a particular juror—the juror had appeared nervous during voir dire and the prosecutor was concerned about the juror's student-teaching commitments. See 128 S. Ct. at 1208. Because "the record d[id] not show that the trial judge actually made a determination concerning [the juror's] demeanor," the Court stated that it could not "presume that the trial judge credited" that explanation for the strike. *Id.* at 1209. The Court then concluded that the explanation regarding the student-teaching commitments was pretextual for a variety of reasons, including "the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious." *Id.* at 1211. The Court further determined that "[t]he prosecutor's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent." *Id.* at 1212.

The Court noted that it had held in other contexts "that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative." *Sndyer*, 128 S. Ct. at 1212. But the Court concluded that it "need not decide" in *Snyder* whether a similar analysis applies in the *Batson* context. *Ibid.* Rather, because "the record [in *Snyder* did] not show that the prosecution would have preemptively challenged [the juror in question] based on his nervousness alone," the Court determined that it was "enough to rec-

ognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution." *Ibid.*

b. Petitioner's contentions that the court of appeals' decision in this case conflicts with *Snyder* are premised on the view that the court of appeals *accepted* the district court's conclusion that the white-collar-experience and college-education factors were pretextual, but nonetheless found no-*Batson* violation based on other nondiscriminatory "fallback explanations" (Pet. 13) that the district court had failed to consider adequately. But, in fact, the court of appeals *rejected* the district court's conclusion that any of the government's explanations was pretextual. The court of appeals concluded that the district court's "central error" had been in "transforming a lack of white-collar experience and college education into a 'litmus test'" that the government had never actually employed and then using the inadequacy of that "litmus test" alone to explain all of the government's use of peremptory strikes as the basis for finding pretext. Pet. App. 18a; see *id.* at 18a-20a. After conducting a "thorough[]" review of "the entire record," *id.* at 17a, the court of appeals concluded that "[w]hen the record is considered in its entirety, it shows that the government exercised its peremptory challenges in a non-discriminatory manner," *id.* at 36a. In short, because the court of appeals did not rely on alternative reasons after finding one government reason to be pretextual, there is no conflict with *Snyder*.

2. Petitioner next contends (Pet. 15-22) that the court of appeals applied the wrong standard of review to the district court's decision. The court of appeals acknowledged that "[a] finding of intentional discrimina-

tion is a finding of fact," Pet. App. 14a (quoting *Batson*, 476 U.S. 98 n.21), and that a reviewing court's conclusion that it "would have decided the case differently" is not sufficient for a reversa., *id.* at 15a (quoting *Easley* v. *Cromartie*, 532 U.S. 234, 242 (2001)). The court of appeals held, however, that deference was not warranted in this particular case because "the district court did not factor in material portions of the record [and thus] misapplied the *Batson* three-part test." *Id.* at 16a None of the decisions cited by petitioner states that the role of a reviewing court in reviewing findings of ultimate fact is precisely the same regardless of whether a district court misapplied the governing legal test. Cf. *Koon* v. *United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").[1]

At any rate, this case would not present an appropriate vehicle in which to determine the precise degree of deference owed to a trial court's ultimate conclusion that there was a *Batson* violation in circumstances where the court "incorrectly recount[ed] much of the record and fail[ed] to note material portions." Pet. App. 16a. The court of appeals expressly stated that "even under a clearly erroneous standard of review, the district court's result would not pass muster." *Id.* at 17a. Cf. *United States* v. *Blotcher*, 142 F.3d 728, 731 (4th Cir. 1998) (see Pet. 17 n.2) (concluding that a district court had committed clear error in finding a *Batson* violation because the court had failed to "acknowledge the rule that intentional discrimination is not shown by a failure to chal-

[1] Petitioner also asserts that "[t]here is simply no support for the Seventh Circuit's conclusion that the district court did not consider the supporting record." Pet. 18; see Pet. 18-20. That case-specific contention does not warrant this Court's review.

lenge all jurors with a given characteristic" or the rule that a party may exercise peremptory challenges for any reason not related to a prohibited characteristic). As a result, this Court's identification of the appropriate standard of review would not change the outcome in this case.[2]

3. Petitioner's final contention (Pet. 22-26) is that the court of appeals erred in not remanding the case to the district court a second time for further consideration of whether the government violated its obligations under *Batson* in striking three minority jurors about whom the district court had not ruled definitively during the first remand. The court of appeals did not deny that remands are generally appropriate in such circumstances. Indeed, in another recent *Batson* case the Seventh Circuit remanded for a determination concerning the credibility of the government's proffered reasons for striking a sixth juror after having upheld the government's challenges of five other jurors. See *United States* v. *Taylor*,

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[2] Petitioner also contends that the district court's finding of intentional discrimination in this case "was not clearly erroneous." Pet. 20; see Pet. 20-21. That issue is not fairly encompassed within any of the questions presented as formulated by petitioner, Pet. i-ii, and petitioner's factbound claim about the proper application of the clearly erroneous standard of review would not warrant this Court's review in any event. At any rate, the court of appeals extensively discussed the government's nondiscriminatory reasons for striking jurors 27 and 36, see Pet. App. 26a-28a, 32a-35a, and the appendix that the court of appeals attached to its opinion reveals that the government had identified non-discriminatory reasons for not striking jurors 20 and 26, see *id.* at 53a (stating that juror 20 was "attending college at the time of trial, at the age of 50, after [a] lifetime of blue-collar work" and that he "would likely be unsympathetic to [petitioner's] lies about his Yale degree"); *id.* at 54a (noting that juror 26 had a sister who was a police officer and had expressed frustration "when asked if anyone was arrested for stealing his trucks").

509 F.3d 839, 845-846, 850-851 (2007). Rather, the court of appeals held that a remand was unnecessary in the particular circumstances of this case because its "thorough[]" review of "the entire record" allowed it to "confidently conclude" that a "remand would be futile." Pet. App. 17a; see *ibid.* (stating that there was "only one plausible conclusion—that there [was] no *Batson* violation"). It is not uncommon for courts of appeals to decline to remand for further proceedings when they conclude that doing so would be futile. See, *e.g.*, *Clark* v. *Perez*, 510 F.3d 382, 393 (2d Cir. 2008); *United States* v. *Timely*, 507 F.3d 1125, 1131 (8th Cir. 2007); *Whitman* v. *Bartow*, 434 F.3d 968, 971 n. 1 (7th Cir.), cert. denied, 547 U.S. 1199 (2006); *United States* v. *Lewis*, 35 F.3d 148, 152 (4th Cir. 1994). Indeed, this Court declined to remand in *Snyder* after concluding that the record as it stood could not support an alternative ground for a valid peremptory challenge. 128 S. Ct. at 1212.

Petitioner has failed to identify any conflict between the court of appeals' failure to remand in this case and the decisions of this Court or any other lower court. This Court's decision in *USPS* v. *Aikens*, 460 U.S. 711 (1983) (see Pet. 25), did not involve a claim of racial discrimination in jury selection. In addition, although this Court chose to remand for further proceedings in that case because it could not "be certain that [the district court's] findings of fact * * * were not influenced by its mistaken view of the law," *id.* at 717, the Court did not state that such remands are required even when a reviewing court's examination of the entire record leads it to conclude that there is only one permissible view of the evidence. Cf. *Sprint/United Mgmt. Co* v. *Mendelsohn*, 128 S. Ct. 1140, 1146 n.3 (2008) (acknowledging such an exception for review of rulings implicat-

ing Fed. R. Evid. 403); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982) (same, for findings of intentional discrimination under Title VII).

Petitioner is correct (Pet. 24-25) that the Second Circuit has remanded several *Batson* cases in order to permit district courts to conduct further proceedings. But the Seventh Circuit has done the same thing in other cases, see *Taylor*, 509 F.3d at 850-851, and none of the Second Circuit decisions cited by petitioner states that such remands are required even when a reviewing court is able to conclude as a matter of law that a remand would be futile.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

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IN THE
Supreme Court of the United States

WAYNE STEPHENS
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF WAYNE STEPHENS

BARRY LEVENSTAM
Counsel of Record
IRINA DMITRIEVA
JENNER & BLOCK LLP
330 NORTH WABASH AVE.
CHICAGO, ILLINOIS 60611
(312) 222-9350

Attorneys for Wayne Stephens

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ARGUMENT

Petitioner Wayne Stephens hereby submits his Reply in support of his Petition for a Writ of Certiorari.

1. In his petition, Stephens demonstrated that the Seventh Circuit's decision in *United States v. Stephens*, 514 F.3d 703 (7th Cir. 2008) ("*Stephens II*"), reversing a district court's finding of intentional discrimination in the Government's use of peremptory strikes, conflicts with this Court's recent decision in *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008), because the Seventh Circuit: (a) improperly faulted the district court for basing its finding of discrimination on two key justifications offered by the Government, which the district court found pretextual, and (b) independently found that the Government did not discriminate against six minority jurors on Stephens's venire without first determining whether the additional explanations offered by the Government were sufficient, in and of themselves, to justify the Government's strikes. In response, the Government contends that there is no conflict with *Snyder* because the Seventh Circuit never accepted the district court's finding that the Government's two key justifications were pretextual. The Government's argument is without merit.

Contrary to the Government's contention, this case is on all fours with *Snyder*. First, *Snyder* held that a prosecutor's proffered explanation for striking a minority juror based on the juror's student-teaching obligations did not withstand scrutiny because the prosecutor accepted white jurors who disclosed conflicting obligations that appeared "to have been at least as serious." 128 S. Ct. at 1211. Here too, the district court found the Government's two key explanations for striking minority jurors -- their lack of college education and white-collar experience -- pretextual because the Government accepted white jurors who shared the same characteristics and who should have raised similar concerns for the Government. Because the district court's reasoning was consistent with *Snyder*, the Seventh Circuit erred by reversing it.

Second, in *Snyder*, this Court ruled that it could not credit the prosecutors' additional explanation regarding a minority juror's alleged nervousness in the absence of any showing that this rationale alone would have been sufficient to strike the juror. 128 S. Ct. at 1212. Here, however, the Seventh Circuit accepted the Government's additional explanations (including Juror No. 10's alleged facial reaction -- which the district court did not credit and which the Seventh Circuit obviously could not have observed). Yet, the Seventh Circuit never considered whether these additional explanations would have been sufficient, in and of themselves, to justify the strikes. Hence, the

Seventh Circuit's decision clearly conflicts with *Snyder*.

2. In his petition, Stephens demonstrated that the Seventh Circuit's decision to pay "no deference" to the district court's finding of intentional discrimination conflicts with the well-established precedent and creates a split among the circuits. In response, the Government contends that this question does not warrant this Court's review because, even if this Court were to rule that the Seventh Circuit applied incorrect legal standard, this "would not change the outcome in this case" because the Seventh Circuit also stated in *dicta* that the district court's finding would not pass muster under the deferential clearly-erroneous standard. (Brief of the U.S. in Opp. At 12.) The Government relies on *United States v. Blotcher*, 142 F.3d 728 (4th Cir. 1998), but *Blotcher* is inapposite.

In *Blotcher*, the Fourth Circuit held that a district court clearly erred by finding that a defendant intentionally discriminated against a white venire member because the defendant's justification -- that the venire member dressed conservatively -- also applied to the Black venire members who wore ties, but whom the defendant nonetheless accepted. In particular, the Fourth Circuit stated that, "intentional discrimination is not shown by a failure to challenge all jurors with a given characteristic." 142 F.3d at 732. In *Blotcher* though, there was only one "given characteristic" for comparing the accepted Black jurors with a stricken

White juror. Here, in contrast, there were up to four characteristics shared by the accepted White jurors and stricken minority jurors.

For instance, stricken Hispanic Jurors Nos. 9 and 21 shared four characteristics with the accepted White Juror No. 11: no college education; blue-collar experience; spelling mistakes on juror questionnaires; and unresponsive answers during voir dire. Based on this comparison, the district court concluded that "the government has failed to identify a persuasive rationale as to why [White] Juror 11's apparent confusion was any less significant than that of [Hispanic] Jurors 9 and 21," finding that the "confusion rationale," as applied to Jurors 9 and 21, was pretextual. *United States v. Stephens*, No. 02-CR-661, 2006 WL 1663447, at *9 (N.D. Ill. June 9, 2006). As this example demonstrates, the Government cited to multiple characteristics to justify its strikes of minority jurors, and yet White jurors -- of whom the Government struck none, despite having a strike left at the end of voir dire -- showed the same complex of characteristics and still served as jurors.

Because the district court's decision was at a bare minimum "plausible" based on the facts of this case, *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985), the Seventh Circuit erred both by refusing to pay any deference to the district court's findings and stating in *dicta* that these findings were clearly erroneous. Indeed, the Seventh Circuit abused the clearly erroneous standard because a

review for clear error is by nature deferential. Here, however, the Seventh Circuit examined the record *de novo*, without paying any deference whatsoever to the findings of the district court though that court had observed the voir dire first-hand. Hence, contrary to the Government's contention, this Court's clarification of the standard governing appellate review of district courts' *Batson* findings, would change the outcome in this case.

3. In his petition, Stephens demonstrated that the Seventh Circuit's failure to remand to allow the district court to determine in the first instance whether the Government discriminated against minority Jurors Nos. 1, 10, and 27 conflicted with this Court's jurisprudence and with the several decisions of the Second Circuit. In response, the Government acknowledges the conflict with the Second Circuit but nevertheless contends that the Seventh Circuit's ruling falls into the narrow category of cases where remand is unnecessary because it would be futile. The Government's contention is without merit.

First, none of the Court of Appeals cases on which the Government relies involve *Batson* claims. Moreover, in all of them appellate courts were in as good a position as district courts to rule upon issues in question: (a) *Clark v. Perez*, 510 F.3d 382 (2d Cir. 2008), and *Whitman v. Bartow*, 434 F.3d 968 (7th Cir. 2006), involved habeas corpus proceedings where district courts sat in review of state court decisions and thus had no first-hand impressions of

trial proceedings; (b) *United States v. Timely*, 507 F.3d 1125 (8th Cir. 2007), involved a question of law, not of fact, as to whether an attorney's lien on criminal proceeds could prevent forfeiture of those proceeds to the government; and (c) in *United States v. Lewis*, 35 F.3d 148 (4th Cir. 1994), the contested evidence involved a "cold record," i.e. a government's written report, and thus an appellate court was in as good a position to review it as the district court. None of the Government's cases involved a situation where, as here, an appellate court usurped the fact-finding role of the district court which oversaw the jury selection and had the benefit of its first-hand observation in ruling upon a pure issue of fact.

Second, the Government cites *Sprint/United Mgmt Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), and *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), for the proposition that remands are not required "when a reviewing court's examination of the entire record leads it to conclude that there is only one permissible view of the evidence." (Brief of the U.S. in Opp. at 13.) The Government's reliance on these cases is misplaced because, in actuality, their holdings support Stephens's position. In *Sprint*, an employment discrimination case, the Tenth Circuit reversed a district court's evidentiary ruling barring evidence of discriminatory acts of supervisors other than a defendant, and held that such evidence was admissible. This Court vacated the Tenth Circuit's decision and instructed the Tenth Circuit to remand the case to allow the district court to clarify the basis for its ruling. 128 S. Ct. at 1147. Significantly, this

Court stated that the relevant evidence -- pertaining to the ultimate issue of discriminatory intent -- "[was] not of that dispositive character" which would have permitted "only one resolution of the factual issue." *Id.* at 1146 n.3.

Further, in *Pullman-Standard*, another employment discrimination case, the Fifth Circuit -- like the Seventh Circuit here -- engaged in independent examination of the record pertaining to the ultimate issue of discriminatory intent after concluding that a district court made an error of law by failing to consider relevant evidence. This Court reversed the appellate court, calling its failure to remand "incredible," 456 U.S. at 293:

> ... whether an ultimate fact or not, discriminatory intent under §703(h) is a factual matter subject to the clearly erroneous standard of Rule 52(a). It follows that when a district court's finding on such an ultimate fact is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of fact-finding in the first instance.

The case for a remand here is even more compelling than in *Pullman-Standard* because the district court here did not even make any initial factual findings regarding the Government's intent to discriminate as to minority Jurors Nos. 1, 10, and 27. The district court deemed it unnecessary to do so

given the clear pretext of the Government's explanations for striking minority Jurors Nos. 9, 21, and 36.

Hence, the Seventh Circuit's failure to remand in *Stephens II* calls for the exercise of this Court's supervisory authority because it is in direct conflict with this Court's holdings in *Sprint/United Mgmt Co.* and *Pullman-Standard*.

Third, the Government cites *United States v. Taylor*, 509 F.3d 839 (7th Cir. 2007), to demonstrate that, in appropriate cases raising *Batson* claims, the Seventh Circuit has remanded to allow a district court to determine in the first instance whether there was an intent to discriminate. The Government, however, neglects to mention that the Seventh Circuit's opinion in *Taylor* was authored by Judge Rovner -- the same judge who dissented in this case. Significantly, Judge Rovner criticized the panel's majority here for failing to remand based on precisely the same reasons the court in *Taylor* ordered a remand: "The third step of *Batson* is a credibility determination -- a question of fact. Only the district judge, who observed the voir dire firsthand, can make that determination in the first instance." 509 F.3d at 845 (citation omitted). Here, the district judge did not make such a determination as to minority Jurors Nos. 1, 10, and 27, and hence the Seventh Circuit should have remanded, in accordance with its earlier ruling in *Taylor*. The fact that this decision also creates a split within the

Seventh Circuit further warrants this Court's exercise of its supervisory powers.

CONCLUSION

For the foregoing reasons, Wayne Stephens respectfully requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit in this matter.

Respectfully submitted.

Barry Levenstam
Counsel of Record
Irina Dmitrieva
Jenner & Block LLP
330 North Wabash Ave.
Chicago, Illinois 60611
(312) 222-9350

Attorneys for Petitioner, Wayne Stephens